1113 (3d Cir. 1986)). Upon such a review, this Court finds that Magistrate Judge Haneke's denial of Dr. Ketzner's motion for leave to amend the Complaint was neither clearly erroneous nor contrary to law.

Many of the proposed amendments involved Dr. Ketzner's complaints concerning defendants' discovery practices, which Magistrate Judge Haneke authorized. Those rulings, which were not timely appealed, are "entitled to great deference and [are] reversible only for abuse of discretion." *Kresefsky v. Panasonic Communications & Sys. Co.*, 169 F.R.D. 54, 64 (D.N.J. 1996). No abuse of discretion is evident. As for the remaining proposed counts, they are adequately embraced by existing counts found in the original Complaint; these proposed counts would generate duplicate allegations. Therefore, for the foregoing reasons, the Court denies plaintiff's appeal of Magistrate Judge Haneke's Order dated May 13, 2002.

JOHN W. BISSELL
JOHN W. BISSELL
Chief Judge
United States District Court

DATED: March 5, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

Filed March 6, 2003

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It on this 5th day of March, 2003,

ORDERED that defendants' motion for partial summary judgment as to plaintiff's bad faith claim be, and it hereby is, granted, and that claim is hereby dismissed, with prejudice.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

OPINION

APPEARANCES:

ANDERSON KILL & OLICK
By: Robert F. Pawlowski, Esquire
One Gateway Center, Suite 901
Newark, New Jersey 07102
(Attorneys for Plaintiff)

DEL MAURO, DIGIAIMO & KNEPPER
By: Steven P. Del Mauro, Esquire
North Tower
8 Headquarters Plaza
Morristown, New Jersey 07960
(Attorneys for Defendants)

BISSELL, *Chief Judge*

Plaintiff Helen Ketzner, M.D., ("Dr. Ketzner" or "plaintiff") brought an action against John Hancock Mutual Life Insurance Company ("John Hancock") and Provident Life Insurance Company ("Provident") (collectively, "defendants") for breach of contract, along with other extra-contractual causes of action, including violation of the duty of good faith and fair dealing, relating to a disability insurance policy originally issued by John Hancock. Defendants move for partial summary judgment with respect to plaintiff's claim that defendants acted in bad faith by failing to make payments on her claim for disability benefits.

BACKGROUND

Dr. Ketzner was born on September 22, 1948 and received her medical degree from the State University of New York at Stonybrook in 1978. After completing her residency training in 1983, she briefly worked at New York University, then for NYNEX in Brooklyn, New York for seven years, then for a short period with Bergen Pines Hospital until July 1995, and finally for a health maintenance organization, HIP Health Plan of New Jersey ("HIP"), as an internist.

Through medical reports, it appears that Dr. Ketzner went to HIP primarily for the higher salary—$150,000 per year. "Within a couple of months she decided that it was the wrong job for her." (Davidson Aff., Exh. 22 at 1 (medical report of Dr. Robert E. Campion)). According to Dr. Campion, Dr. Ketzner reported "feeling tense in her dealings with patients, and she recounted being threatened by some of them." (*Id.*) Furthermore, "[h]er concentration was poor, she was losing weight, and she

derived little enjoyment from anything." (*Id.*) Therefore, by mid-November 1997 "she stopped working." (*Id.*)

Plaintiff contends that she left her position at HIP due to a medical disability, specifically dysthymic depression. Defendants counter that she made a conscious decision to leave her employment and that whatever Dr. Ketzner's mental impairments, they did not "meet the definition of total disability, nor did she qualify for total disability benefits." (Defendants' Br. at 27).

Dr. Ketzner's first disability income insurance policy with defendants was through John Hancock in 1980. It provided "disability income protection if she were injured or ill and not able to perform the material duties of her occupation" and it was noncancellable. (Plaintiff's Br. at 1). On July 22, 1991, John Hancock reissued Dr. Ketzner's disability income insurance policy, number H009 757 339, in light of a premium reduction.[1]

Psychiatric Disability Claim

Plaintiff asserts that in late December 1997, she called defendants to provide notice of a forthcoming disability claim. (*See* Plaintiff's Br. at 2). Defendants counter that they first received notice of Dr. Ketzner's intent to file a disability claim on January 12, 1998. (*See* Defendants' Br. at 5-6). In response, that same day, defendants forwarded the necessary claim forms to Dr. Ketzner. (*See*

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[1] "Pursuant to an agreement entered on July 30, 1992, [Provident] assumed responsibility for adjudicating claims under certain policies previously issued by John Hancock, including the policy issued to Dr. Ketzner. Under this agreement, [Provident] was solely responsible for performing all claim administration, as well as funding the payment of benefits, and John Hancock did not participate in the adjudication or payment of benefits under the policy of disability income insurance." (Defendants' Br. in Opp. to Plaintiff's Notice of Appeal at 1).

Pawlowski Aff., Vol. I, Exh. 4). It is unclear what forms were forwarded; however, defendants noted that the "Statement of claim form [had] to be fully completed, dated and signed by [Dr. Ketzner] and [her] Attending Physician." (*Id.*) The Statement of Claim is a two-page form, and the Attending Physicians Statement is a one-page form.

Plaintiff contends that she forwarded the completed forms to defendants on February 8, 1998. On February 9, 1998, defendants did receive a form—"Claimant Occupation Description"—from Dr. Ketzner. (*See* Defendants' Br. at 6). Defendants assert, however, that the Statement of Claim was not received in February and, as the January 12, 1998 letter noted, that completed form was necessary to proceed with the claim investigation. (*See* Defendants' Br. at 6; Pawlowski Aff., Vol. I, Exh. 4).

In a handwritten note, dated March 5, 1998, Dr. Ketzner wrote that she was faxing to defendants a copy of the "forms sent to [defendants] on February 8, 1998 which [defendants] supposedly ha[d] not received." (Pawlowski Aff., vol. I, Exh. 6). Dr. Ketzner also noted that she would be sending hard copies of the forms, as well as a copy of her therapist's reports, as soon as they were completed again. (*See id.*)

Defendants state that a completed Statement of Claim was finally received on March 27, 1998. (*See id.* at 7). In fact, the only copy of the Statement of Claim, accompanied by the necessary Attending Physicians Statement, offered as evidence by either plaintiff or defendants is one signed by plaintiff's therapist, Marsha K. Ontell, on March 6, 1998, and by one of plaintiff's physicians, Dr. Campion, on March 17, 1998. Because the Attending Physicians Statement was last signed on March 17th, it is credible that defendants first received a completed Statement of Claim on March 27th.

It appears that the Attending Physicians Statement was completed either by Ms. Ontell or Dr. Ketzner, herself, and not by Dr. Campion, although the form asked that an attending doctor's opinion be given as to the "degree of disability." (*See* Pawlowski Aff., Vol. I, Exh. 7). Nevertheless, the form was signed by Dr. Campion in the lower right hand corner where an address was requested. On the face of the form, however, it appears that Ms. Ontell, as the primary signatory, is the medical provider referred to throughout.

On the form, Dr. Ketzner is diagnosed with "dysthymic depression r/o major depression."[2] According to the form, Dr. Ketzner's symptoms first appeared on November 13, 1997, and her first consultation with Ms. Ontell concerning these symptoms and Dr. Ketzner's "total disability" began on November 14, 1997. (*See id.*) The form adds, however, that Dr. Ketzner had experienced "depressive episodes in the past with exacerbation." No treating physician was mentioned, but Ms. Ontell is reported as having treated Dr. Ketzner with "psychotherapy sessions" twice a week since November. Ms. Ontell's conclusion was that Dr. Ketzner was "unable to work at present."

After receiving the necessary three pages of forms to begin the claim investigation, on April 8, 1998, defendants forwarded to Dr. Ketzner "a supplementary claim form" to be completed by Dr. Ketzner and her "attending

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[2] According to the National Mental Health Association, dysthymia is a disorder similar to clinical depression but with milder symptoms and is longer-lasting. It is considered less disabling than major depression. Although the disorder lasts for at least two years, those affected are usually able to go on working and do not need hospitalization. Also, "r/o" is a widely accepted medical abbreviation for "rule out." Therefore it appears that Dr. Ketzner was diagnosed as having dysthymia, and major depression was ruled out.

physician" and returned to defendants by May 20, 1998, and a questionnaire to be completed within two weeks of receipt. (*See* Pawlowski Aff., Vol. I, Exh. 14). In addition, on or about May 4, 1998, defendants forwarded to Dr. Campion and Ms. Ontell questionnaires, along with requests for a copy of their treatment records. (*See* Defendants' Br. at 7; *see also* Pawlowski Aff., Vol. I, Exh. 20). Based on a telephone log, Ms. Ontell called defendants concerning her treatment notes. (*See* Davidson Aff., Exh. 20). Two days later, Ms. Ontell spoke with defendants and stated that although she would send a summary of her treatment notes, she would not release the treatment notes to defendants. (*See id.*) Ms. Ontell also asked defendants not to contact Dr. Ketzner because it "upsets her." (*See id.*)

On May 4, 1998, Dr. Ketzner contacted defendants claiming that she was "being victimized and tortured by John Hancock." (*See* Pawlowski Aff., Vol. I, Exh. 10). She continued that she and her therapist, Ms. Ontell, had been answering "endless questions and forms" and considered defendants' actions as "continuing harassment." (*Id.*) Furthermore, Dr. Ketzner requested that an appointment with defendants' agent, a claims adjuster, be cancelled. On May 11, 1998, Dr. Ketzner's then attorney, Teresa E. LaBosco, contacted defendants with a similar complaint regarding the "submissions and resubmissions of materials" and stated that defendants "cease and desist dilatory tactics and pay [Dr.] Ketzner the benefits to which she is entitled under her contract." (*See* Pawlowski Aff., Vol. I, Exh. 12).

On May 12, 1998, defendants received from Ms. Ontell a completed Physician/Therapist Questionnaire. (*See* Pawlowski Aff., Vol. I, Exh. 20). Ms. Ontell's responses to the questionnaire provided a detailed medical history on psychotherapy sessions held within the

past few months. However, Ms. Ontell failed to provide the requested copy of "treatment and evaluation notes" regarding her consultations with Dr. Ketzner.

In addition to her medical conclusions, Ms. Ontell noted that Dr. Ketzner had "instructed [her] to state that [Dr. Ketzner] cannot handle any further contact or communication with [defendants] at present and that she would be willing to see a psychiatrist from [defendants] at their expense if that [was] required to expedite her claim." (*Id.*)

On May 14, 1998, Dr. Ketzner wrote directly to John Hancock and specifically accused the claims manager handling her claim of being an "unscrupulous and unethical obstructionist and liar." (Pawlowski Aff., Vol. I, Exh. 13 at 1). Again, Dr. Ketzner voiced her complaints concerning the requests for information made on Ms. Ontell, and now on Dr. Campion. Dr. Ketzner considered these requests harassing and stated that defendants' actions were "worse than the Nazis my parents survived." (*Id.* at 3). She concluded her letter with a notice that she would "seek appropriate remedies." (*Id.*)

In response to Dr. Ketzner's continuing claims of harassment and her unwillingness to meet with a claims investigator, defendants forwarded to Dr. Ketzner's counsel a letter requesting assistance on June 23, 1998. (Pawloswki Aff., Vol. I, Exh. 16). Specifically, defendants asked Ms. LaBosco to arrange for a meeting with defendants' field representative for an interview. (*See id.*) Defendants also requested names and contact information for other "treatment providers" seen by Dr. Ketzner because, to date, defendants did not have "sufficient information to substantiate the proof of loss requirement." (*Id.*)

Within a week of defendants' letter to Dr. Ketzner's counsel, Dr. Ketzner faxed to defendants a letter stating

that defendants were in violation of "New Jersey's Insurance Regulation regarding unfair trade practices regarding insurance. N.J.A.C. 11:2-17." (Pawlowski Aff., Vol. I, Exh. 17 at 1). The letter summarized part of the claims process that had occurred and concluded that legal action may necessary. (*See id.* at 3). The letter was copied to her counsel, Ms. LaBosco, and to a consumer complaints' investigator at the New Jersey Department of Banking and Insurance.[3]

By July 23, 1998, Dr. Ketzner had changed her mind, and stated that she "would be glad to" meet with a "claims adjuster." (Pawlowski Aff., Vol. I, Exh. 18). She requested that the meeting take place at Ms. Ontell's office instead of at her home, and she looked forward to a response from defendants. On July 28, 1998, defendants responded to both Dr. Ketzner and her attorney.

A July 28, 1998 letter to Dr. Ketzner reiterated a prior message that "since [Dr. Ketzner was] represented by an attorney, Teresa E. LaBosco, all correspondence and communication must go through her." (Pawlowski Aff., Vol. I, Exh. 19 at 3). That same day, defendants mailed to Ms. LaBosco a letter stating that "[defendants] have not received any correspondence from you regarding [defendants'] letter dated June 23, 1998" requesting more information regarding Dr. Ketzner's medical history. (*Id.* at 1). Defendants further mentioned that Dr. Ketzner had contacted them directly about her willingness to meet with a "field representative," but noted that

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[3] Defendants contend that the New Jersey Department of Banking and Insurance responded to Dr. Ketzner's complaint. In a letter dated July 23, 1998, the investigator concluded that Provident's "actions [were] in accordance with the policy contract provisions, applicable statutes and regulations." (Defendants' Statement of Uncontested Material Facts, ¶59)

an appointment would not be scheduled without Ms. LaBosco's authorization. (*See id.*)

In response, on August 5, Ms. LaBosco "advised that, as Dr. Ketzner informed you by letter dated July 14, 1998, I do not represent her. Accordingly, please contact Dr. Ketzner directly." (Davidson Aff., Exh. 36). Defendants deny ever receiving the July 14 letter referred to by Ms. LaBosco, and plaintiff has failed to produce that letter as well.

On August 24, 1996, defendants wrote to Dr. Ketzner acknowledging receipt of Ms. LaBosco's August 5 letter. In addition, defendants reported that they were attempting to schedule the previously declined appointment with a field representative. Defendants also noted that they were still awaiting information from a Dr. Ebrahim J. Kermani, information that was necessary to process her disability claim. (*See* Defendants' Statement of Uncontested Material Facts, ¶ 62).

On September 11, 1998, Dr. Ketzner complained that defendants failed to respond to her July 23 request to meet with a field representative at Ms. Ontell's office. She did not refer to the August 24 letter sent to her by defendants addressing her request.

Joanne Grillo, a field representative, made three efforts to meet with Dr. Ketzner in late September and early October, but each attempt resulted in no response from Dr. Ketzner's medical provider of choice, Ms. Ontell. Finally, on October 13, 1998, Ms. Grillo met Dr. Ketzner. After complaints about the harassing nature of the interview and a debate over whether Dr. Ketzner could audiotape the interview, Dr. Ketzner discussed her condition with the field representative. In particular, Dr. Ketzner claimed that, based on her consultation with Dr. Campion, she did not require medication. This contradicted Dr. Campion's diagnosis. Yet, Dr. Ketzner admit-

ted receiving prescription medication from a "psychiatrist friend in Connecticut" who she would not identify. The medication included Paxil, Prozac and Zoloft. Miss Grillo concluded that

> Throughout the visit, minimal information was obtained, but specific details, facts and dates were left out. Numerous questions remain unanswered, the severity of disability, medical confirmation of diagnosis[,] and if there is a disability[,] is treatment appropriate? This needs further clarification; as discussed, possibly [an independent medical examination]. [Dr. Ketzner] is not cooperative and obtaining a copy of the [audio]tape of the visit has not occurred, as she has not responded to my requests.

(Davidson Aff., Exh. 41 at 4).

Based on Ms. Grillo's conclusions, on October 15, 1998, Dr. Ketzner's "disability file was referred for a second medical review." (*See* Defendants' Statement of Uncontested Material Facts, ¶ 70). This second review was conducted on October 21, 1998, and defendants "noted that the diagnosis of major depression was 'clearly not substantiated. . . .' " (*Id.*, ¶ 71). This conclusion was reached based on numerous contradictions, ambiguities and unsubstantiated diagnoses found when comparing Dr. Ketzner's Statement of Claim, the Attending Physicians Statement, responses to questionnaires sent to Dr. Ketzner's medical providers and the interview conducted by Ms. Grillo.[4] (*See* Davidson Aff., Exh. 42). Mirroring Ms. Grillo's conclusion, the second review commented that an independent medical examination may be necessary. (*See id.*)

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[4] These contradictions and others will be fully described below in the subsection titled "Conflicting Information."

On October 20, 1998, Dr. Ketzner's new legal counsel, Jonathan C. Bauer of Anderson Kill & Olick, P.C., sent a letter to defendants outlining the perceived mishandling of Dr. Ketzner's disability claims and asked for payment within 30 days under threat of suit. (*See* Davidson Aff., Exh. 44).

On October 22, 1998, defendants wrote to Dr. Ketzner again asking that Ms. Ontell provide defendants with her treatment notes. (*See* Davidson Aff., Exh. 43). Defendants also requested a copy of the audiotape made by Dr. Ketzner of her interview with the field representative Ms. Grillo. (*See id.*) According to defendants, both items were necessary to process her disability claim. In conclusion, defendants stated that they had completed a thorough review of the information at hand and found that there was insufficient information to substantiate Dr. Ketzner's claim. (*See id.*) As such, defendants stated that if the requested information was not received within 30 days, the claim request would be closed as incomplete. (*See id.*)

The following day, defendants responded to the letter from Dr. Ketzner's new counsel. It acknowledged that the October 22 letter to Dr. Ketzner was sent before the letter from counsel was received. Defendants reiterated that they were awaiting Ms. Ontell's medical notes and the audiotape, and asked Mr. Bauer to assist in obtaining these items so that a claims determination could be made. (*See* Davidson Aff. Exh. 45).

Shortly thereafter, defendants received a "psychiatric summary" from Dr. Nora Heflin Williams. (*See* Davidson Aff., Exh. 46). This summary further clouded the medical information regarding Dr. Ketzner's condition. Dr. Williams stated that Dr. Ketzner "displayed no cognitive impairment. Insight and judgement were adequate." (*Id.* at 1). Yet Dr. Williams' "impression" was

that Dr. Ketzner suffered from major depression and recommended antidepressant medication.

On November 11, 1998, defendants received a second letter from Mr. Bauer explaining why he believed defendants were acting in bad faith. (*See* Davidson Aff., Exh. 48 at 1) Mr. Bauer argued that defendants had knowledge that Ms. Ontell's treatment notes did not exist, yet defendants kept requesting them. (*See id.* at 1-2). Additionally, Mr. Bauer was puzzled as to why defendants needed the audiotape from Ms. Grillo's interview with Dr. Ketzner when an audiotape of the interview was made solely on Dr. Ketzner's request and defendants saw no need for one initially. (*See id.* at 2).

Defendants responded by citing the May 6, 1998 telephone conversation between Ms. Ontell and defendants in which she stated that "she would not release her treatment notes"; thereby implying that the notes did exist. (*See* Davidson Aff., Exh. 49). Based on "the lack of objective information," defendants concluded that the "only alternative [was] to schedule Dr. Ketzner for a comprehensive Independent Medical Evaluation [IME] at [defendants'] expense." (*Id.*) Defendants requested Mr. Bauer's help in locating Ms. Ontell's treatment notes, which would be helpful for the IME. Furthermore, defendants, in what they termed "an effort to show good faith," provided Dr. Ketzner with three months of benefits. (*Id.*)

On December 7, 1998, Mr. Bauer responded that all of Ms. Ontell's "paperwork that relates to Dr. Ketzner" had been provided. (*See* Davidson Aff., Exh. 50 at 1). And, that "[w]e look forward to the 'Independent Medical Examination.' " (*Id.* at 2). By the end of December, appointments had been made for Dr. Ketzner to be examined by Drs. Nancy and David Gallina.

The reports by Drs. Gallina were filed in mid-January. Based on these reports, defendants denied Dr. Ketzner's application for disability benefits in mid-March 1999 citing Dr. David Gallina's determination that Dr. Ketzner did not leave her job with HIP due to a medical disability. This action ensued.

MEDICAL HISTORY

1. November 21, 1997: Robert E. Campion, M.D.

Dr. Campion is a board certified psychiatrist who fist saw Dr. Ketzner as a patient on November 21, 1997. A week after leaving her job with HIP, she saw Dr. Campion. Dr. Ketzner called Dr. Campion and told him that she was in psychotherapy, which led him to believe that Dr. Ketzner had "questions about her need for medication." (Davidson Exh. 22 at 21). Dr. Ketzner reported to him, however, that she did not need medication, but that although she was satisfied with Ms. Ontell, Dr. Campion would be better able to "help her with issues related to medical practice." (*Id.*)

Dr. Campion diagnosed Dr. Ketzner as having general anxiety disorder, but ruled out major depressive disorder. He suggested that treating Dr. Ketzner could possibly "fragment" the current treatment given by Ms. Ontell, and that Dr. Ketzner should first consult Ms. Ontell, who had not been informed of Dr. Ketzner's visit with Dr. Campion. (*See id.* at 2). A brief follow-up visit in mid-December 1997 occurred. Then, Dr. Campion, after diagnosing that Dr. Ketzner was not suicidal, determined that she needed "MD back-up", but chose not to treat her due to a conflict. (*See id.*) Instead, Dr. Campion stated that he would make a referral.

2. April 22 and May 4, 1998: Marsha K. Ontell, LCSW, DCSW

In a half-page "Treatment Summary" dated April 22, 1998, Ms. Ontell, an experienced Licensed Clinical Social Worker, stated that Dr. Ketzner had been seeing her for "weekly psychotherapy sessions off and on during the past few years."[5] According to other medical reports, Ms. Ontell is a "psychotherapist" "who deals with children of [H]olocaust survivors." (Davidson Aff., Exh. 22 at 2).

Ms. Ontell's report stated, almost in its entirety, that:

> For several months preceding her disability leave from HIP on November 14, 1997, Dr. Ketzner was experiencing severe depression and anxiety related to her work environment. She decided to take a leave of absence from her employment and to concentrate on her own health and wellbeing. Her depression persisted, but the level of acute anxiety decreased. It was helpful for Dr. Ketzner to increase her sessions for several weeks during this difficult time.

(Pawloski Aff., Vol. I, Exh. 15).

In a May 4, 1998 response to the Physician/Therapist Questionnaire, Ms. Ontell stated that Dr. Ketzner planned to have "phone contact with [her] on a daily basis and if needed to consider medical evaluation, and increased psychotherapy sessions." (Pawlowski Aff., Vol. I, Exh. 20 at 2). Ms. Ontell recited Dr. Ketzner's difficulties with defendants "at a time when she is emotionally distraught and incapable of working and carry-

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[5] According to Dr. Campion's report, Dr. Ketzner began seeing Ms. Ontell "[a]round the time of her divorce six years ago. . . ." (Davidson Aff., Exh. 22 at 2).

ing out many of her daily activities." (*Id.*) In conclusion, Ms. Ontell stated that "it is not possible for [Dr. Ketzner] to return to work at [her] position [with HIP]." (*Id.* at 4).

3. July 2, 1998: Ebrahim J. Kermani, M.D.

On or about July 2, 1998, Dr. Kermani submitted an evaluation to defendants and copied the same to Dr. Ketzner's attorney. Dr. Kermani is a licensed physician experienced in "the field of clinical psychiatry." (Pawlowski Aff., Vol. I, Exh. 24 at 1). He stated that he conducted a lengthy psychiatric evaluation of Dr. Ketzner and reviewed a report prepared by Ms. Ontell and evaluations prepared by Dr. Campion based on "November 1997" visits. However, the evaluation fails to state when he conducted the psychiatric evaluation.

Dr. Kermani's evaluation noted that "[o]n or around November 1997, Dr. Ketzner experienced a severe panic attack, depression and suicidal attempts and ideation." (*Id.*) Compounding her "mental condition" were "several physical ailments involving her eyes, foot and hand" which "pushed her to the verge of suicide." (*Id.*) Overall, Dr. Kermani's diagnosis was that Dr. Ketzner had "[m]ajor depression . . . with [a] global functioning assessment (GAF) at 40." (*Id.* at 2). He explained that a "GAF must be above 70 in order for a person to be considered reasonably functional." (*Id.*) As such, he found it was—and is—"impossible for [Dr. Ketzner] to work in the field of medicine or any field that requires precision[.]"[6] (*Id.*)

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[6] Dr. Kermani stated that since November 1997, "there has been no significant change in [Dr. Ketzner's] psychological condition. She remains emotionally distraught and incapable of carrying out her daily activities." (Pawlowski Aff., Vol. I, Exh. 24 at 2).

During discovery, a subpoena was served on Dr. Kermani. He responded by letter dated July 24, 2000. (*See* Defendants' Statement of Uncontested Material Facts, ¶ 58). That letter revealed that he had evaluated Dr. Ketzner on "one occasion, provided no treatment, and could locate no records concerning his evaluation." (*Id.*)

4. July 8 and 14, 1998: Nora Heflin Williams, M.D.

On October 20, 1998, Dr. Williams prepared a "Psychiatric Summary" of Dr. Ketzner. It was not addressed, to anyone, but it reported her "[i]mpression[s]" and "[r]ecommendations" based on "consult[ations] report. Dr. Ketzner last worked in November 1997 after leaving her job because of "severe depression and anxiety attacks." (Pawlowski Aff., Vol. I, Exh. 25 at 1). It also reported that "[f]or the past seven years, [Dr. Ketzner] has been in therapy with a social worker [Ms. Ontell] who is a 'Holocaust specialist." (*Id.*)

Based on a "Mental Status Exam," Dr. Williams reported that Dr. Ketzner "denied psychotic symptoms or suicidal intent. She displayed no cognitive impairment. Insight and judgement were adequate." (*Id.*) Dr. Williams' impression of Dr. Ketzner's mental state was that she had "Major Depressive Disorder, recurrent, moderate Dysthymia" and "Borderline Personality Disorder." (*Id.*) As such, Dr. Williams recommended that Dr. Ketzner take "antidepressant medication, specifically an SSRI [but] she was to see her psychiatrist for this." (*Id.*) However, Dr. Ketzner expressed during the consultations that she feared that "medication might 'numb' her emotionally, prolonging her dealing with her issues." (*Id.*) In addition, Dr. Williams recommended that Dr. Ketzner return to [Ms. Ontell] to discuss her negative feelings about the therapy and whether she should terminate." (*Id.*) As to this recommendation, Dr. Williams did not

provide any indication in the Psychiatric Summary as to why this was made. Finally, Dr. Williams asked that Dr. Ketzner follow up with her as to her decisions based on these recommendations.

5. August 17, 1998: Nora Heflin Williams, M.D.

On August 17, 1998, Dr. Ketzner followed up with Dr. Williams and reported that she had begun taking Paxil (as prescribed by "her former psychiatrist") and requested further treatment with Dr. Williams. Dr. Williams refused, however, because she was "unavailable for the intensive treatment [she] believed [Dr. Ketzner] would benefit from." (*Id.* at 2). Therefore, Dr. Williams recommended a colleague. In addition, it was Dr. Williams' understanding that Dr. Ketzner was continuing to see Ms. Ontell "without feeling she is benefitting from the therapy." (*Id.*)

6. January 7 and 28, 1999: Nancy B. Gallina, Ph.D.

Dr. Nancy Gallina is a psychologist selected by defendants who examined Dr. Ketzner for 104 hours over two days in January 1999. Defendants claim that this was an "independent psychiatric examination" necessary to assess Dr. Ketzner's disability claim. (*See* Defendants' Br. at 23). Plaintiff argues, however, that Dr. Nancy Gallina and her husband, Dr. David G. Gallina, are "routinely hired by insurance companies to assist in the denial of disability insurance benefits." (Plaintiff's Br. at 17, 16-18).

Dr. Nancy Gallina noted that Dr. Ketzner's "[l]evels of depression were clinically significant." (Pawlowski Aff., Vol. I, Exh. 30 at 6). Furthermore, the tests indicated that "[t]here were indications of passive suicidal thoughts." (*Id.* at 7). Nevertheless, Dr. Nancy Gallina

concluded that Dr. Ketzner is not experiencing psychological impairments that would prevent her from working, or training herself for some type of employment other than medicine." (*Id.* at 12). This conclusion was conditioned, however, with the fact that Dr. Ketzner would need "the assistance of continued outpatient psychological treatment and possible psycho-pharmacological management." (*Id.*)

7. January 28, 1999: David J. Gallina, M.D.

On behalf of defendants, Dr. David Gallina, a board certified psychiatrist, also examined Dr. Ketzner. A "mental status examination" composed of nearly a dozen "psychological assessments" was performed. Dr. David Gallina concluded that, as of the examination date, "Dr. Ketzner's mental status examination is essentially normal, with no objective signs of serious psychiatric illness that would immediately impair her functional ability." (Pawlowski Aff., Vol. I, Exh. 28 at 24). Dr. Ketzner did, however, have a "series of underlying patho-logies . . . for stress induced exacerbation of her symptoms." (*Id.*) These psychiatric symptoms of anxiety and depression could be treated primarily with therapy and psychopharmacologically, secondarily. (*See id.* at 25).

As to Dr. Ketzner's current state of unemployment, Dr. David Gallina stated that she was "making a conscious career choice as to whether she want[ed] to continue to practice medicine, or enter another type of job market." (*Id.*) Dr. Gallina concluded that her "conscious career choice" in ending her practice with HIP was "not related to any medical disability." (*Id.*)

ANALYSIS

1. Conflicting Information

From the onset, plaintiff's disability claim was mired in confusion. Although Dr. Ketzner asserts that she sent to defendants notice of her claim in December 1997, for what appears acceptable reasons, defendants allege that they did not receive a completed Statement of Claim until March 27, 1998. And, it was not until May 1998 that defendants received a completed Physician/Therapist Questionnaire from Ms. Ontell, Dr. Ketzner's primary care-giver. Ms. Ontell, however, did not produce for defendants the requested "treatment and evaluation notes." That further delayed the claims process.

By then, Dr. Ketzner's accusations of "obstructionist" behavior on the part of defendants had begun. This led to Dr. Ketzner's unwillingness to meet with a claims investigator because he was not a medical professional suitable to diagnose her condition. By July 1998, Dr. Ketzner retained counsel. As such, defendants were obliged to communicate through Dr. Ketzner's counsel. After a series of missed opportunities to meet, by both sides, renewed efforts at resolving the claim were made in October 1998. Even then, however, Ms. Ontell refused to release the requested treatment notes.

After receiving further medical reports from Drs. Kermani and Williams, defendants allege that more questions arose that necessitated appropriate documentation. In particular, this Court notes that although Dr. Ketzner maintains that she has steadfastly refused anti-depressant medication, by August 1998, she had begun taking Paxil as prescribed by "her former psychiatrist." Certainly, no mention of this doctor and this treatment was reported directly by Dr. Ketzner to defendants. Treatment such as

this would appear to be material in determining the claim at hand.

By late 1998, it became clear to defendants that independent medical examinations were necessary. As such, in January 1999, Drs. Gallina evaluated her. Dr. David Gallina determined that Dr. Ketzner did not leave her job with HIP due to a medical disability, and thus defendants denied her claim.

By early 1999, conflicting medical opinions included the fact that Dr. Campion assessed, very shortly after she left her job with HIP, that Dr. Ketzner suffered from a generalized anxiety disorder, but did not have major depressive disorder. In addition, the Attending Physicians Statement submitted by Ms. Ontell to defendants ruled out major depression as a diagnosis. This conflicts directly with Dr. Williams' finding that Dr. Ketzner had "Major Depressive Disorder, recurrent, moderate Dysthymia" and "Borderline personality Disorder." Neither Drs. Campion nor Williams mentioned whether Dr. Ketzner's mental state, with or without proper treatment, precluded her from functioning as a medical doctor. Dr. Kermani, however, did make that conclusion, while Drs. Gallina did not.

Defendants reviewed the reports submitted by Drs. Gallina on March 15, 1999. A few days later, but almost a year after receiving the initial paperwork in the claims process, defendants "confirmed its determination to deny Dr. Ketzner's claim for disability benefits." (Defendants' Br. at 26). All of the above-mentioned disputes, including personal, administrative and medical opinions, provided conflicting or unsubstantiated claims, thus prolonging the resolution of Dr. Ketzner's claim for disability.

2. Standard for Summary Judgment

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (*en banc*), *cert. dismissed*, 483 U.S. 1052 (1987). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *Continental Insurance Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there exists no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment:

> the judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict. . . .

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the out-

come of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable fact finder could return a verdict for the nonmoving party. (*Id.*)

3. Discussion

Defendants' argument for partial summary judgment rests on how New Jersey State courts have placed the burden of establishing bad faith claims on plaintiffs. In *Pickett v. Lloyd's & Peerless Insurance Agency, Inc.*, 131 N.J. 457 (1993), the New Jersey Supreme Court held that in order for a plaintiff to sustain a bad faith claim, the plaintiff must establish that the insurer lacked a "fairly debatable" reason for its failure to pay the claim and that the insurer knew or recklessly disregarded the lack of a reasonable basis for denying the claim. *See Pickett*, 131 N.J. at 473 (quoting *Bibeault v. Hannover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980, and *Anderson v. Continental Ins., Co.*, 271 N.W.2d 368, 376-77 (Wis. 1978)).

The *Pickett* court chose a middle-of-the-road approach in setting the "fairly debatable" standard, as defendants correctly point out. That court rejected a "definition of bad faith that would equate with simple negligence." *Picket*, 131 N.J. at 472 (citing *Lunsford v. American Guar. & Liab. Ins. Co.*, 775 F. Supp. 1574, 1583 (N.D. Cal. 1991)). On the other end, that court also rejected the "concept of bad faith on the part of the insurer" that requires "some motive of self-interest or ill will' [where] mere negligence or bad judgment is not bad faith." *Coyne v. Allstate Ins. Co.*, 771 F. Supp. 673 (E.D. Pa. 1991). Instead, by selecting the "fairly debatable" standard, the *Pickett* court chose what it considered the "most balanced approach." *Pickett*, 131 N.J. at 473.

As it relates to summary judgment motions, *Pickett* held that "[u]nder the 'fairly debatable' standard, a

claimant who [cannot] establish[ ] as a matter of law a right to summary judgment on the substantive claim [cannot] be entitled to assert a claim for an insurer's bad faith refusal to pay the claim." (*Id.*) Here, defendants assert that plaintiff cannot establish as a matter of law a right to summary judgment. Obviously, plaintiff has not moved for summary judgment; but, dispositively, there are numerous issues of material fact with respect to defendants' decisions concerning plaintiff's claim. All of which are fairly debatable. As noted above there are competing medical reports about Dr. Ketzner's mental state.

Plaintiff offers, however, that "[t]he potential for misapplication of *Pickett* depending on the circumstances of a particular case was recognized in *Tarsio [v. Provident Insurance Co.*, 108 F. Supp. 2d 397 (D.N.J. 2000)]." (Plaintiff's Br. at 22). Much like the present case, the plaintiff Tarsio purchased disability insurance policies from the Provident Life Insurance Company. Diagnosed as suffering from major depression, Tarsio claimed that he could no longer work. Almost a year after his disabling symptoms appeared, Tarsio was seen by Provident's independent medical examiners "Drs. Gallina—the same doctors who evaluated Dr. Ketzner—who maintained that Tarsio may have exaggerated his symptoms. Shortly thereafter, Provident denied Tarsio's claim. Tarsio sued Provident alleging, in part, that Provident refused in bad faith to pay his claim. The defendant Provident moved for summary judgment on the bad faith claim.

Judge Wolin noted in *Tarsio* that he "doubt[ed] the wisdom of [the 'fairly debatable'] standard". *Tarsio*, 108 F. Supp. 2d at 401. In dictum, that court argued that a finding for summary judgment would "preclude[ ] a jury from deliberating 'bad faith' simply because a court finds issues of fact as to the underlying claim." (*Id.*) The *Trasio* court was concerned that a "jury may ultimately

reject the insurer's evidence and find that the insurer possessed no basis to reject plaintiff's claim." (*Id.*)

In the end, however, *Tarsio* acknowledged that as a federal court sitting in diversity, it had to apply the substantive laws of New Jersey; thus *Pickett* controlled. Because the defendants in *Tarsio* raised genuine issues of material fact as to the bad faith claim, partial summary judgment was granted.

Plaintiff also argues that Drs. Gallina are not independent" medical examiners as defendants contend. Plaintiff states that "Drs. Gallina's loyalties belong to the disability insurance company, specifically Provident." (Plaintiff's Br. at 19). To support her argument, plaintiff points to *Tarsio* and *Tehan v. Disability Management Services, Inc.*, 111 F. Supp. 2d 543 (D.N.J. 2000), where Dr. David Gallina was also involved as an "independent" medical examiner for Reassure America Life Insurance Company. This accusation that "Drs. Gallina are not independent medical examiners, but a part of Provident's network of 'independent' medical examiners" is taken into consideration.

Dr. David Gallina's detailed 26-page report helps to illustrate the competing and often contradictory opinions rendered by previous health professionals before he evaluated Dr. Ketzner on January 28, 1999. In fact, Dr. David Gallina outlines the following records that he reviewed prior to evaluating Dr. Ketzner:

1. Medical report, Robert E. Campion, M.D., 11/21/97.
2. Medical report, Nora Heflin Williams, M.D., 7/98.
3. Medical Report, Ebrahim J. Kermani, M.D., undated.
4. Report, Marsha K. Ontell, LCSW, DCSW.

5. Treatment summary, Marsha K. Ontell, LCSW, DCSW, 4/22/98.

6. Physician/therapist questionnaire, 5/4/98.

7. Insured's statement of claim, 2/6/98.

8. Correspondence to HIP Health Plan of N.J., 4/8/98.

9. Correspondence of Helen Ketzner, 4/8/98.

10. Individual disability claim dept. psychiatric claim unit, clinician referral form, date of referral 5/18/98.

11. Insured's supplementary statement of claim, 7/31/98.

12. Various correspondence from Dr. Ketzner, 4/29/98, 5/4/98, 5/14/98, 7/23/98 and 9/11/98.

13. Various other voluminous records too numerous to itemize but were reviewed by me.

(Pawlowski Aff., Vol. I, Exh. 28 at 3). That Dr. David Gallina concluded that Dr. Ketzner did not leave her employment due to a medical disability, but voluntarily decided to end her medical practice is his medical opinion. Defendants' acceptance of Dr. David Gallina's conclusions and the subsequent denial of Dr. Ketzner's claim for disability based on his opinion appears, at a minimum, "fairly debatable."

Certainly, genuine issues of fact result from the findings of Drs. Gallina; however, this Court finds that genuine issues of fact existed well before the examinations by Drs. Gallina. Viewing all the evidence—with its numerous inconsistencies concerning Dr. Ketzner's medical condition, time delays resulting from miscommunications between defendants and Dr. Ketzner, her medical support and her attorneys, and plaintiff's failure

to produce requested documents in a timely manner—this Court finds that a reasonable juror could find that defendants reasonably denied Dr. Ketzner's claim for benefits. Plaintiff, as a matter of law, cannot establish a right to summary judgment with respect to her claim for disability benefits. Consequently, plaintiff's claim that defendants acted in bad faith fails.[7]

CONCLUSION

For the foregoing reasons, the Court grants defendants' motion for partial summary judgment as to plaintiff's bad faith claim. That claim is dismissed, with prejudice.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

DATED: March 5, 2003

[7] The Court has not ignored plaintiff's claim that defendant John Hancock's acknowledgment of plaintiff's disability for purposes of waiving the payment of premiums due on plaintiff's variable life insurance policy evidences Provident's bad faith denial of such status regarding the disability policy in suit. (*See* Plaintiff's Br. at 10-12; Pawlowski Aff., Exh. A, Tabs 32, 33). This evidence and argument does not support plaintiff's position here. First, the application for waiver of life insurance premiums was to a different decision-maker (Hancock, not Provident) on a different policy, with different disability requirements and different consequences. Furthermore, plaintiff's application for life insurance premium waivers was [illegible] in July 1999, nearly four months *after* Provident had finally de[illegible] her claim on the disability policy. Therefore, it cannot be argued th[illegible]ne defendants made conflicting determinations in the same time frame. The actions taken on the application for waiver of life insurance premiums are irrelevant to the issue of alleged bad faith regarding Provident's denial of disability benefits.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852
(Hon. John W. Bissell)

Filed April 22, 2003

HELEN KETZNER, M.D.

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, *et. al*

Defendant.

ORDER DENYING MOTION TO AMEND COMPLAINT

This matter having come before the Court for a status conference; and plaintiff's counsel having stated his desire to amend the complaint to assert a cause of action under the RICO statute; and the Court being of the opinion that such an amendment would be futile because it could not withstand a motion to dismiss; and this Court having previously discussed and ruled on this issue in *Mark v. Unum Provident Corp.*, Civil Action No. 00-3872 (JAG) and believing that the *Mark* opinion rea-

soning is applicable to the attempt to amend the complaint in this action; and good cause appearing

It is on this 21st day of April, 2003

ORDERED: that the request to amend the complaint is hereby denied. A copy of the *Mark* opinion is attached hereto and incorporated by reference.

Any appeal from this decision is to be fully briefed and submitted to Chief Judge Bissell by June 17, 2003 so that the appeal may be argued together with the defense motion for summary judgment.

G. DONALD HANEKE

G. DONALD HANEKE
UNITED STATES MAGISTRATE JUDGE

[LETTERHEAD OF UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY]

June 28, 2002

LETTER OPINION
ORIGINAL TO CLERK OF THE COURT

David M. Hoffman, Esq.
815 Mountain Avenue
P.O. Box 951
Springfield, NJ 07081

Del Mauro, Digiaimo & Knepper, P.C.
8 Headquarters Plaza
North Tower
Morristown, NJ 07960

RE: Mark v. UnumProvident Corp., et al
Civil Action No. 00-3872 (JAG)

Dear Counsel:

Presently before the Court is a motion by Plaintiff, Nathan Mark ("Mark") for leave to file a second amended Complaint to include additional causes of action under the Employee Retirement Income Security Act ("ERISA") and the Racketeering Influence Corruption Organization Act ("RICO") both individually and on behalf of class members he seeks to represent. Defendant, UnumProvident Corporation ("UnumProvident") opposes this motion.

Background

This action involves a contract between Plaintiff's employer, Zeitech, Inc., and UnumProvident for a group

long-term disability policy (the "Policy").[1] In May 1997, Plaintiff became and permanently totally and permanently disabled as defined by the Policy's provisions.[2] From August 14, 1997 through February 15, 2000, Defendant paid the benefits, minus the amount Plaintiff received from Social Security. In February 2000, after further consideration of Plaintiff's condition, Defendant made the determination to discontinue payments to Plaintiff.[3] In March 2000, Plaintiff appealed this decision under Defendant's review policy. Prior to a decision of this appeal, Plaintiff filed his original complaint in August, 2000.

The original Complaint was filed in an attempt to obtain benefits allegedly due Plaintiff under the Policy. Plaintiff filed an Amended Complaint in November, 2000 and Defendant filed an Answer in December 2000. At a conference before me in January 2001, Defendant contended that Plaintiff had not exhausted his administrative remedies in this dispute since a decision had not been reached on the appeal.

As a result of this dispute, I persuaded the parties to agree to a stay of the lawsuit and the claim was remanded for completion of the administrative review. At the conference, the parties also agreed to allow me to select a

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[1] The Policy was originally issued by The Paul Revere Life Insurance Company, a Provident Company, which later merged with Unum Corporation to form UnumProvident Corporation in July 1999. The proposed complaint also names Paul Revere as a Defendant.

[2] Mark was diagnosed with Guillain-Barre Syndrome by Dr. Jonathan Quevedo. Defendant approved the claim for disability and began benefit payments after the ninety-day elimination period.

[3] Defendant had a medical review performed by Dr. Michael Theerman and also conducted surveillance of the Plaintiff engaging in various activities.

physician to examine Mark.[4] After this examination, Defendant reversed its original claim determination, reinstated Mark's disability claim, and paid past due benefits.

In August 2001, I held a status conference. At that time, Plaintiff announced his intentions to seek leave to file a second amended complaint, which Defendant stated it would oppose. In February 2002, Plaintiff filed a motion for leave to file an Amended Complaint. Defendant opposed that motion. Prior to a ruling on that motion, Plaintiff withdrew it and in May 2002, filed the present motion for leave to file a different version of the second Amended Complaint.

Plaintiff seeks to amend the complaint as follows: First, Plaintiff wishes to designate Mark as representative of the class and add three additional class representatives.[5] Second, to elaborate upon the Defendant's alleged "Scheme" of denying policy benefits under Fed R. Civ P. 9 which requires specificity when asserting bad faith claims.[6] Third, to include a RICO count.

In the proposed Amended Complaint, the Plaintiff Class alleges that the bad faith claim-handling "Scheme" damaged them and they should recover under ERISA and RICO. Plaintiff contends also that the Defendant will not be prejudiced by the proposed amendments. Defendant opposes the motion by challenging the Court's jurisdiction and denying the existence of a

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[4] I selected Dr. Michael Rubin to perform an independent medical examination. Dr. Rubin was one of five physicians recommended by the Defendant. The examination was conducted on April 19, 2001.

[5] The additional plaintiff representatives are Bruce D. Reitman, Marvina Jenkins, and Anne Coolidge Gerken.

[6] Plaintiff uses the term "Scheme" to describe the Defendant's alleged system of improperly denying benefits to policy holders.

"Scheme" to defraud policyholders. In addition, Defendant disputes the ability of Mark to represent the proposed class since his unpaid benefits have been paid and his disability payments reinstated.

Applicable Law

a. Amending the Pleadings

Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be given when justice so requires." Fed. R. Civ. P. 15(a). The Comments to the Rule provide that "generally, leave to amend is granted unless a weighing of several factors suggest that leave would be inappropriate." These factors include "undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment." *Foman v. Davis,* 371 U.S. 178, 182 (1962). In the absence of any of these factors, the amendment should be granted. *Id.*

In order for an amendment to be considered futile, the amendment must be legally insufficient to withstand a motion to dismiss. *Massarsky v. General Motors Corp.,* 706 F.2d 111, 125 (3d Cir.), *cert. denied,* 464 U.S. 937 (1983). When evaluating a motion to dismiss, "the plaintiff is afforded the safeguard of having all of its allegations taken as true and all inferences favorable to plaintiff will be drawn." *Mortensen v. First Federal Sav. And Loan Ass'n.,* 549 F.2d 884, 891 (3d Cir. 1977). In addition, "[g]iven the liberal standard applied to the amendment of pleadings, courts place a heavy burden on opponents who wish to declare a proposed amendment futile." *Le v. Five Fathoms, Inc.,* No. CIV. 91-3168 (SSB), 1992 WL 471246, at *2 (D.N.J. Aug 14, 1992.)

A court may also deny a motion to amend if allowing the amendment would result in unfair prejudice. *Foman*, 371 U.S. at 182. In order to deny the motion to amend based on unfair prejudice, the nonmoving party "has a heavier burden than merely claiming prejudice, it must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence it would have offered." *Heyl v. Patterson Int'l. v. F. D. Rich Housing*, 663 F.2d 419,426 (3d Cir. 1981), *cert. denied*, 445 U.S. 1018 (1982) *(citing Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 n.19 (3d Cir. 1969)). Additionally, incidental prejudice to the non-moving party is not sufficient to deny a motion to amend. *Harrison Beverage Co. v. Dribeck Importers, Inc.*,133 F.R.D. 463, 468 (D.N.J. 1990).

The Rule, Comments, and case law dictate that leave should be granted so long as the amended complaint is not futile or the non-moving party is not unfairly prejudiced. The burden falls on the non-moving party to demonstrate this futility and unfair prejudice.

b. Class Actions

The necessary criteria to pursue a class action are detailed in Fed. R. Civ. P. 23, which requires a demonstration of (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation. Fed. R. Civ. P. 23(a). In order to be certified, the class must fall within one of the three categories enumerated in Rule 23(b): (1) avoidance of inconsistent results, (2) injunctive relief sought; or (3) questions of law or fact which are common among the members of the class. Fed. R. Civ. P. 23(b). The Rule requires also that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." Fed. R. Civ. P. 23(c)(1).

In the Third Circuit, so long as the class representative has a live claim when moving for class certification, then "neither a pending motion nor a certified class action need to be dismissed if his individual claim subsequently becomes moot." *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 135 (2d Cir. 2000). However, if the "representative's individual claim becomes moot before he moves for class certification, then any subsequent motion must be denied and the entire action dismissed." *Id.* at 135-36.

c. ERISA

The Second Count of the proposed Second Amended Complaint seeks injunctive relief under the Employment Retirement Income Security Act ("ERISA") 29 U.S.C. § 1132(a)(3). This section of ERISA states that a participant or beneficiary may bring a civil action

> (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (I) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .[7]

At oral argument, Mr. Del Mauro, on behalf of the Defendant, cited to two United States Supreme Court decisions, *Mass. Mut., Life. Ins. Co. v. Russell*, 473 U.S. 134 (1985), and *Varity v. Howe*, 516 U.S. 489 (1996), for the proposition that under ERISA a beneficiary or par-

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[7] Plaintiff's original Complaint sought relief under subsection (a)(1), which allows a participant or beneficiary to bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan." § 1132(a)(1)(B).

ticipant cannot sue for breach of fiduciary duty when there are other remedies available.

I have reviewed these two cases. However, neither *Russell* nor *Varity* stands unambiguously for the proposition asserted. In *Russell*, the issue before the Court was whether § 1109(a), entitled "Liability for Breach of Fiduciary Duty," provides a cause of action for extra-contractual compensatory or punitive damages to a beneficiary caused by improper or untimely processing of a claim for benefits. *Russell*, 473 U.S. at 136. The Court ruled that it does not. *Id.* at 148.

In *Varity*, the issue before the Court was whether § 1132(a)(3) authorizes ERISA plan beneficiaries to bring an action for individual relief to beneficiaries who were harmed by a breach of fiduciary duty. *Varity*, 516 U.S. at 492. The Court ruled that it does. *Id.* However, the Court did state, in dicta:

> We should expect that courts, in fashioning appropriate equitable relief will keep in mind the special nature and purpose of employee benefit plans, and will respect the policy choices reflected in the inclusion of certain remedies and the exclusion of others. Thus, we should expect that where Congress elsewhere provided adequate relief for a beneficiary's injury, there will likely be no need for further equitable relief, in which case such relief would not normally be appropriate.

Id. at 515 (internal quotation marks omitted).

In the course of my research, I discovered a relatively recent decision by the Eastern District of Pennsylvania which is instructive. In *Parente v. Bell Atlantic-Penn.*, No. Civ. A. 99-5478, 2000 WL 419981, *1 (E.D. Pa. Apr. 18, 2000), the court was confronted with the issue of whether the plaintiff was prohibited from seeking relief under § 1132(a)(3) because she had an adequate

remedy in her claim for recovery of benefits under § 1132(a)(1)(B). *Id.* at *2.[8] The court ultimately held that "[n]othing in the language of § 1132(a)(3) provides that a plaintiff may not bring a claim under both § 1132 (a)(1)(B) and (a)(3)." *Id.* at *3. The *Parente* court spent a considerable amount of time discussing the *Varity* case in reaching its decision. The relevant discussion follows:

> The language used by the Supreme Court in *Varity* does not mandate the dismissal of § 1132(a)(3) claims whenever a § 1132(a)(1)(B) claim also is brought. The Supreme Court's statement that "there will *likely* be no need for further equitable relief . . . indicates that the Court was not drawing a bright-line rule that a claim for equitable relief under § 1132(a)(3) should be dismissed when a plaintiff also brings a claim under § 1132(a)(1)(B). To the contrary, at the very least, the language means that in some cases, the relief provided by another section of ERISA, such as § 1132(a)(1)(B), will be inadequate, and additional equitable relief under § 1132(a)(3) will be necessary.
>
> . . . .
>
> [U]nder *Varity*, a plaintiff is only precluded from seeking equitable relief under § 1132(a)(3) when a court determines that plaintiff *will certainly receive or actually receives* adequate relief for her injuries under § 1132(a)(1)(B) . . . .

Id. at *3 (emphases in original).

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[8] In *Parente*, the plaintiff applied for long-term disability benefits through her employer, Bell Atlantic's plan, which was administered by Aetna Life Insurance Company. *Parente*, 2000 WL 419981 at *1. Her claim was denied and plaintiff appealed. *Id.* After a final determination was made, she filed an action under ERISA. *Id.*

The *Parente* court noted also that the Third Circuit has never "squarely addressed" this issue. *Id.* The court explained:

> The cases in which the court of appeals has addressed *Varity* [have] been procedurally similar to *Varity* in that plaintiffs either did not assert claims under § 1132(a)(1)(B) or such a claim was deemed insufficient. . . .
>
> None of these cases held that a plaintiff may not assert claims under both § 1132(a)(1)(B) and (a)(3). The two cases decided after *Varity* . . . merely repeated the holding of *Varity* that plaintiffs may assert claims for breaches of fiduciary duties under § 1132(a)(3) and did not engage in an anal-ysis of *Varity*'s "appropriate equitable relief" language.

Id.

However, the *Parente* court did acknowledge that it disagreed with other Pennsylvania district courts that had concluded that a plaintiff's claims under § 1132(a)(3) must be dismissed whenever plaintiff also asserts a claim under § 1132(a)(1)(B). *Id.* at *2.

Moreover, the *Parente* court stated that even if it accepted the proposition that §§ 1132(a)(1)(B) and (a)(3) were mutually exclusive, a plaintiff should be permitted to assert claims under both sections under Fed. R. Civ. P. 8(e)(2), which specifically permits pleading in the alternative. *Id.* at *3, Thus, the court reasoned that "the better course is to allow plaintiff to proceed under both § 1132(a)(1)(B) and (a)(3), and to leave final consideration of the appropriateness of the equitable relief requested . . . until it can be determined whether

§ 1132(a)(1)(B) in fact provides plaintiff appropriate relief from her injuries." *Id.* at *4.[9]

A search of cases in the District of New Jersey did not reveal any cases on point. In fact, there were only two cases that may be remotely relevant. The first one is *Sirkin v. Phillips Colleges, Inc.*, 779 F. Supp. 751 (D.N.J. 1991), in which Judge Sarokin noted that "plaintiff's actions must be characterized either as one for

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[9] A May 2002 case agreed with the *Parente* decision. In *Nicolaysen v. BP Amoco Chem. Co.*, No. Civ. A. 01-CV-5465, 2002 WL 1060587, at *2 (E.D. Pa. May 23, 2002), the court explained why:

> Defendants allege, that Plaintiffs' claim for breach of fiduciary duty must be dismissed under *Varity* . . . . In that case, the Supreme Court commented that if Congress provided plaintiffs with an adequate remedy for their injury elsewhere in *ERISA*, then "there will likely be no need for further equitable relief, in which such case such relief would normally would not be 'appropriate' " under § 502(a)(3). . . . Defendants allege that since Plaintiffs possess a claim for benefits under § 502(a)(1)(B), they have an adequate remedy, and a claim under § 502(a)(3) must be dismissed.
>
> Many courts have cited this language in dismissing claims for breach of fiduciary duty upon a motion to dismiss where a plaintiff has also asserted a claim for benefits under § 502(a)(1)(B). . . . These decisions focus on the Supreme Court's equivocal language in *Varity*, which does not appear to draw a absolute bright-line rule excluding claims for relief under § 502(a)(3) if a claim is also asserted under § 502(a)(1)(B). . . . These courts also cite the fundamental fairness of permitting parties to plead in the alternative. . . . The Court finds the reasoning of these latter courts to be persuasive, and therefore denies the motion to dismiss as applied to Plaintiffs' claims for breach of fiduciary duty at this time. Defendants' argument may be reasserted at the summary judgment stage.

Id. at *2 (§ 502 is the numbering of the law itself, which corresponds to the codified § 1132).

recovery of benefits under 29 U.S.C. § 1132(a)(1)(B) or as one for 'enforcement' of the 'terms of [the] plan' under 29 U.S.C. § 1132(a)(3)." *Id.* at 753 n.3. The other case is *Savage v. Federated Dept. Store, Inc. Retirement Income & Thrift Incentive,* Civ. A. No. 88-4444, 1989 WL 146298, at *1 (D.N.J. 1989). In *Savage,* Judge Bissell merely refers to the causes of action contained in the complaint, two of which are claims under § 1132(a)(1)(B) and § 1132(a)(3). *Id.**4. However, nothing is said about the viability of pleading both causes of action.[10]

Analysis

There is no Third Circuit precedent on the issue of whether a plaintiff can assert claims under both § 1132(a)(1)(B) and § 1132(a)(3). However, as noted by the *Parente* court, if Plaintiff did, in fact, receive adequate relief under § 1132(a)(1)(B), then it appears that he is precluded from seeking equitable relief under § 1132(a)(3). If he has not received adequate relief, then Plaintiff should be permitted to file his proposed Second Amended Complaint to include a count for injunctive relief.

In this case, I believe that Plaintiff has in fact received adequate relief under § 1132(a)(1)(B) because his claim has been and is being paid. In my judgment, the second count of the original claim will *probably* be dismissed upon appropriate motion by the Defendant. Plaintiff is, in other words, precluded from seeking equitable relief

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[10] Furthermore, in *Stafford v. E.I. DuPont De Nemours,* No. 01-1289, 2002 WL 90979, at *1 (3d Cir. Jan. 24, 2002), the court also merely referred to the fact that the plaintiff had asserted claims under both subsections without discussing the feasibility of same.

under § 1132(a)(3). Since Plaintiff essentially has *no* valid claims remaining, either monetary or equitable, it follows that class action treatment of the pending matter is not appropriate.

As for the purported RICO claims sought to be asserted in the proposed amended pleading, I believe them to be a transparent effort to circumvent the strictures of ERISA, which was specifically designed to limit the available remedies for plaintiffs in the types of disputes which lie at the core of this lawsuit.

According to the Rule, Comments, and case law, the nonmoving party has the burden of demonstrating that the proposed amended complaint is futile or that the non-moving party would be unfairly prejudiced as a result of the amendment. If this burden is not met, the amendment should be allowed. As noted, I believe that the Defendant has met the burden of demonstrating futility in this case.

Since the proposed amendments would be futile, I hereby deny the motion to amend, without prejudice to a renewal of the motion should review of my order be sought before Judge Greenaway and such review results in a reversal.

An appropriate order is filed herewith.

Very truly yours,

G. DONALD HANEKE

G. Donald Haneke
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

ORDER

For the reasons set forth in the Court's opinion filed herewith,

It is on this 25th day of November, 2003,

ORDERED that plaintiff's motion for reconsideration of this Court's opinion and order dated March 5, 2003 be, and it hereby is, denied.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

OPINION

APPEARANCES:

ANDERSON KILL & OLICK
By: Robert F. Pawlowski, Esquire
One Gateway Center, Suite 901
Newark, New Jersey 07102
(Attorneys for Plaintiff)

DEL MAURO, DIGIAIMO & KNEPPER
By: Steven P. Del Mauro, Esquire
North Tower
8 Headquarters Plaza
Morristown, New Jersey 07960
(Attorneys for Defendants)

BISSELL, *Chief Judge*

Plaintiff Helen Ketzner, M.D. ("plaintiff" or "Dr. Ketzner") moves for reconsideration of this Court's Opinion (the "Opinion") and order dated March 5, 2003 granting defendants John Hancock Mutual Life Ins. Company and Provident Life Insurance Company's ("defendants") motion for partial summary judgment as to plaintiff's bad faith claim.

Plaintiff argues that the Court: (1) "misapprehended the definition of the medical term 'rule out' and erroneously concluded that there were 'competing medical reports about Dr. Ketzner's mental state.' "; (2) "overlooked the key portions of the medical reports of Dr. David J. Gallina . . . and erroneously found Dr. Ketzner's claim to be 'fairly debatable' "; and (3) "overlooked inconsistencies regarding Dr. Gallina's reports as well as the fact that Dr. Ketzner was provided no discovery regarding Dr. Gallina to resolve these inconsistencies, [thereby] prematurely granting Provident partial summary judgment." (Plaintiff's Br. at 1).

FACTS

This Opinion will rely on the facts as presented in the "Background" and "Medical History" sections of the Opinion. (*See* Opinion at 2-24). Additional facts presented here will be appropriately cited.

DISCUSSION

I. Motion for Reconsideration Standard

A motion for reconsideration is governed by Local Civil Rule 7.1(g). It requires that the moving party "set forth concisely the matters or controlling decisions

which counsel believes the [Court] has overlooked." *Pittston Co. v. Sedgwick James of New York, Inc*, 971 F. Supp. 915, 918-19 (D.N.J. 1997). Thus, a party "must show more than a disagreement with the court's decision." *Panna v. Firstrust Sav. Bank*, 760 F. Supp. 432, 435 (D.N.J. 1991). A mere "recapitulation of the cases and arguments considered by the court before rendering its original decision fails to carry the moving party's burden." *Carteret Sav. Bank, F.A. v. Shushan*, 721 F. Supp. 705, 709 (D.N.J. 1989). "Only where the court has overlooked matters that, if considered by the court, might reasonably have resulted in a different conclusion, will it entertain such a motion." *Re: United States v. Compaction Sys. Corp. et al.*, 88 F. Supp. 2d 339, 345 (D.N.J. 1999).

II. "Rule/Out"

On November 21, 1997, Dr. Ketzner was seen by Dr. Campion. After reviewing Dr. Ketzner's "background history," he concluded his written medical evaluation with the following psychiatric diagnosis: "Generalized Anxiety Disorder Rule/out Major Depressive Disorder." Dr. Ketzner now offers evidence that that diagnosis when stated in layman's terms means that "(a) Dr. Ketzner is diagnosed with Generalized Anxiety Disorder; (b) more information must be gathered to determine whether or not Dr. Ketzner suffers from Major Depressive Disorder; and[ ] (c) Major Depressive Disorder *cannot* be ruled out at this time." (Schiebel Aff., ¶ 7) (emphasis in original). Accepting, *arguendo*, plaintiff's presentation of the meaning of "rule/out", the Court incorrectly concluded in the Opinion that Dr. Campion had actually "ruled out major depressive disorder" as

one of Dr. Ketzner's possible conditions. (*See* Opinion at 16, 24).[1]

> By early 1999, conflicting medical opinions *included* the fact that Dr. Campion assessed, very shortly after she left her job with HIP, that Dr. Ketzner suffered from a generalized anxiety disorder, but did not have major depressive disorder. In addition, the Attending Physicians Statement submitted by Ms. Ontell[2] to defendants rule out major depression as a diagnosis. This conflicts directly with Dr. Williams' finding that Dr. Ketzner had "Major Depressive Disorder, recurrent, moderate Dysthymia" and "Borderline [P]ersonality Disorder."

Opinion at 24 (emphasis added).

This review, however, of what the Court considered then as conflicting medical evidence was only one example of what the Court determined were "genuine issues of fact [that] existed well before the examinations of Drs. Gallina." (*Id.* at 30). The Court did not limit itself

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[1] At this point in the present opinion, the Court will not include in its review of the medical diagnoses those made by Drs. Gallina. Dr. Ketzner correctly points out that this Court stated that there were "competing and often contradictory opinions rendered by previous health professionals" before Drs. Gallina evaluated Dr. Ketzner. (*See* Plaintiff's Br. at 3 (citing Opinion at 29)).

[2] The Court noted in the opinion that "[i]t appears that the Attending Physicians Statement was completed by either Ms. Ontell or Dr. Ketzner, herself, and not by Dr. Campion, although the form asked that an attending doctor's opinion be given as to the 'degree of disability.' " (Opinion at 5 (citing Pawlowski Aff., Vol. I, Exh. 7)). The Court continued that '[n]evertheless, the form was signed by Dr. Campion on the lower right hand corner where an address was requested. On the face of the form, however, it appears that Ms. Ontell, as the primary signatory, is the medical provider referred to throughout." (Opinion at 5; *see also* Schiebel Aff., Exh. B at 3).

to the differing diagnoses using the term "rule out"; the Court merely "included" that example as one among others.

Immediately following the analysis concerning the diagnoses using the term "rule/out", the Court also noted that "[n]either Drs. Campion nor Williams mentioned whether Dr. Ketzner's mental state, with or without proper treatment, precluded her from functioning as a medical doctor." (*Id.* at 24). That observation alone provides sufficient uncertainty in the diagnosis for a reasonable juror to find that defendants reasonably denied Dr. Ketzner's claim for benefits.[3] However, the Court will also point out other conflicting medical evidence which further supports its previous holding.

As stated above, Dr. Campion's evaluation of Dr. Ketzner on November 21, 1997 was summarized succinctly by the following *"DSM-IV Diagnosis"* Generalized Anxiety Disorder Rule/out Major Depressive Disorder." (Schiebel Aff., Exh. C at 2) (emphasis in original). On March 17, 1998, however, Dr. Campion signed the required Attending Physicians Statement on behalf of Dr. Ketzner which was forwarded to defendants. In response to the request for "Diagnosis and concurrent conditions" the completed form states that Dr. Ketzner had "Dysthymic Depression R/O Major Depression."[4] (*See id.*, Exh. B at 3). Assuming at present that

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[3] Dr. Ketzner in her motion for reconsideration fails to note that the Court also based its decision on "time delays resulting from miscommunications between defendants and Dr. Ketzner, her medical support and her attorneys, and plaintiff's failure to produce requested documents in a timely manner." (Opinion at 30).

[4] The correlating "ICD-9-CM Impairment Code" listed was "300.40", which is the code for "Dysthymic Disorder". (*See* Schiebel Aff., Exh. C at 2).

both diagnoses indicate that major depression cannot be ruled out, the primary diagnoses are drastically different. In November 1997, she was diagnosed with "Generalized Anxiety Disorder" and only four months later she was diagnosed with "Dysthymic Depression."

The Diagnostic and Statistical Manual of Mental Disorders (the "DSM-IV") published by the American Psychiatric Association is repeatedly relied upon by courts as an authoritative source for defining psychiatric nomenclature.[5] (*See* Diagnostic and Statistical Manual of Mental Disorders: Text Revision (4th ed. rev., Amer. Psych. Ass'n 2000)). The DSM-IV classifies mental disorders based on the consensus of available knowledge. (*See id.* at xxxvii). The listed disorders are grouped into 16 major diagnostic classes. (*See id.* at 10). "Mood Disorders" and "Anxiety Disorders" constitute two of these major diagnostic classes, and the individual disorders that fall under each of these major diagnostic classes share "phenomenological[6] features in order to facilitate differential diagnosis." (*Id.*) For example, depressive disorders and bipolar disorders fall under the umbrella classification of "Mood Disorders" because of their phe-

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[5] In *Keller v. Larkins*, 251 F.3d 408 (3d Cir. 2001), the Third Circuit Court of Appeals stated that "the third revised edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (3d ed. rev. 1987) (DSM-III-R), [is] a standard reference work that lists and describes mental disorder." *Keller*, 251 F.3d at 412; *see also Morales v. Apfel*, 225 F.3d 310, 313-14 nn. 2-3 (3d Cir. 2000) (looking to the DSM-IV to define "Personality Disorder" and "Antisocial Personality Disorder").

[6] The online Oxford English Dictionary defines "phenomenological" as "dealing with the description and classification of phenomena, not with the explanation or cause." A phenomenological analysis is one that is based on direct experience as opposed to an ontological understanding.

nomenological similarities, whereas, social phobia and generalized anxiety disorder are similar enough to each other (and correspondingly dissimilar to the named "Mood Disorders") that they are grouped in the "Anxiety Disorders" class.

Dr. Campion relied on these classifications in evaluating Dr. Ketzner. His November 1997 report listed his diagnosis as a "DSM-IV Diagnosis." Dr. Campion's two primary diagnoses of "Generalized Anxiety Disorder" and "Dysthymic Depression" conflict.[7] According to the DSM-IV, the "essential feature of Generalized Anxiety Disorder is excessive anxiety and worry . . . occurring more days than not for a period of at least 6 months, about a number of events or activities" (*See* DSM-IV § 300.02 at 472). Whereas, the "essential feature of Dysthymic Disorder is a chronically depressed mood that occurs for most of the day more days than not for at least 2 years." (*Id.*, § 300.4 at 376). Nevertheless, the DSM-IV notes that "Generalized Anxiety Disorder very frequently co-occurs with Mood Disorders (e.g., Major Depressive Disorder or Dysthymic Disorder) (*Id.*, § 300.02 at 473) .

Here, the Court is not attempting to question the validity of Dr. Campion's diagnoses. The Court is aware that a patient's condition can change and that Dr. Ketzner may have suffered from a mood disorder such as Dysthymic Disorder which "must cause clinically significant distress or impairment in social, occupational (or academic), or other important areas of functioning." (*Id.*,

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[7] In support of plaintiff's motion for reconsideration, the affidavit of David P. Schiebel, M.D., was submitted. Dr. Schiebel concluded that when the term "r/o" is used, "the first diagnosis is complete and certain". (Schiebel Aff., ¶ 3). The fact that two competing but "complete and certain" diagnoses were proffered provides sufficiently conflicting medical evidence.

§ 300.4 at 377). By noting Dr. Campion's different diagnoses, the Court is simply providing another example of what it previously determined were conflicting medical opinions. And, the Court maintains that the disputes, "including personal, administrative and medical opinions, provided conflicting or unsubstantiated claims thus prolonging the resolution of Dr. Ketzner's claim for disability", notwithstanding any possible misreading of the medical term of art "rule/out." (*See* Opinion at 24).

As stated in the Opinion, the New Jersey Supreme Court has held that in order for a plaintiff to sustain a bad faith claim, the plaintiff must establish that the insurer lacked a "fairly debatable" reason for its failure to pay the claim and that the insurer knew or recklessly disregarded the lack of a reasonable basis for denying the claim. (*See Pickett v. Lloyd's & Peerless Ins. Agency, Inc.*, 131 N.J. 457, 473 (1993) (quoting *Bibeault v. Hanover Ins. Co.*, 417 A.2d 313, 319 (R.I. 1980), and *Anderson v. Continental Ins. Co.*, 271 N.W.2d 368, 376-77 (Wis. 1978)). "(A] claimant who [cannot] establish[ ] as a matter of law a right to summary judgment on the substantive claim [cannot] be entitled to assert a claim for an insurer's bad faith refusal to pay the claim." *Pickett*, 131 N.J. at 473.

In defendants' motion for partial summary judgment, defendants asserted that Dr. Ketzner cannot establish as a matter of law a right to summary judgment. Even discounting the Court's alleged misinterpretation of "rule/out", there still exists competing medical reports—as well as other factors—that were "fairly debatable" as to defendants' decision to deny Dr. Ketzner's liability claim.

III. Dr. Gallina's Report and Discovery Issue

Plaintiff also contends that this Court "overlooked facts and inconsistencies regarding Dr. David Gallina's report which support Dr. Ketzner's claim.[8] (Plaintiff's Br. at 11). According to plaintiff, Dr. Gallina diagnosed Dr. Ketzner with "Major Depressive Disorder.[9] (*See id.* at 6 (citing Pawlowski Aff., Vol. I, Exh. 28)). As such, her condition was not "fairly debatable."

Plaintiff is incorrect. Dr. Gallina's 26-page report dated January 29, 1999 did not conclude that Dr. Ketzner had Major Depressive Disorder. Major Depressive Disorder was mentioned at times in the report, but not as Dr. Gallina's final diagnosis. For example, Dr. Gallina in his "summary of relevant records" recorded that a physician's "[i]mpression [of Dr. Ketzner's condition; was 'major depressive disorder, recurrent, moderate dysthymia; borderline personality disorder.' " (Davidson Aff., Exh. 56 at 5). That "impression" is likely attributable to Dr. Williams who made that finding in a report prepared on October 20, 1998. (*See* Opinion at 19). In response to certain psychiatric tests. Dr. Gallina also stated that Dr. Ketzner's performance [was] consistent with scores reported by person with a variety of psychiatric disorders including major depression, anxiety disorder, and other mood disorders as well as personality disorders." (Davidson Aff., Exh. 56 at 9-10). This broad observation was not Dr. Gallina's conclusion, however. Similarly, Dr. Gallina's statement that "[d]iagnostic considerations based on [another examination]

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[8] The Pawlowski affidavit that includes Dr. Gallina's 1999 report omits pages 18-21. These additional findings by Dr. Gallina are presented in an exhibit to the Davidson affidavit presented by defendants, specifically at Exhibit 56.

[9] Plaintiff fails to provide a pinpoint citation for this assertion.

include major depressive episode, or a personality disorder" does not reflect a medical conclusion, but simply a "consideration." (*Id.* at 11). Finally, Dr. Gallina reported in a section titled "Clinical Syndromes" that Dr. Ketzner suffered from "Major Depressive Disorder Recurrent, In Partial Remission." (*Id.* at 22). That does not reflect Dr. Gallina's ultimate medical conclusion, however. Instead, it conflicts with plaintiff's unqualified assertion that "Dr. Gallina diagnosed Dr. Ketzner with 'Major Depressive Disorder.'" (Plaintiff's Br. at 11).

It is granted that Dr. Gallina's summary of Dr. Ketzner's performance on a dozen different psychiatric tests provides a panoply of negative results. Dr. Gallina noted that in response to one test, Dr. Ketzner's "[l]evels of depression were clinically significant." (Davidson Aff., Exh. 56 at 7). After another test, Dr. Gallina reported that "[d]iagnostic considerations include a diagnosis of severely neurotic with an anxiety disorder or dysthymic disorder and a schizoid—personality." (*Id.* at 7). However, these were not Dr. Gallina's only considerations. He reviewed Dr. Ketzner's own account of her present and past difficulties as well as making his own observations. And, based on all these considerations, Dr. Gallina concluded that "[a]t the present time, during today's evaluation, Dr. Ketzner's mental status examination is essentially normal, with no objective signs of serious psychiatric illness that would immediately impair her functional ability." (*Id.* at 24). That was his conclusion—although he also noted that "underlying pathologies" could cause a "recurrence of psychiatric symptoms under certain stressful conditions." (*Id.* at 25).

The Court, when it issued the Opinion, had reviewed Dr. Gallina's 1999 report carefully. And after further review for purposes of this motion, the Court reiterates that Dr. Gallina's conclusion concerning Dr. Ketzner's

condition provided "genuine issues of fact." Therefore, the Court correctly held that plaintiff failed to "establish as a matter of law a right to summary judgment" as required under *Pickett*.

A secondary argument made by plaintiff here is that Dr. Gallina's subsequent affidavit "casts doubt on to the credibility of his original report." (Plaintiff's Br. at 12). As such, "[h]ad the [C]ourt not overlooked the fact that Dr. Ketzner has had no discovery regarding Dr. Gallina's conflicting expert opinion, the Court would have concluded that there is, at least, a question of fact as to whether or not Dr. Ketzner's claim was fairly debatable and that pursuant to Rule 56 F (sic), summary judgment should not be granted." (*Id.* at 12-13).

With this argument, plaintiff misses the basis for the Court's grant of defendants' motion for partial summary judgment as to the bad faith claim. As long as defendants' denial of Dr. Ketzner's claim for disability insurance was "fairly debatable," under New Jersey law, that claim cannot stand, as New Jersey State courts have placed the burden of establishing bad faith claims on plaintiffs. Dr. Gallina's 1999 report provided some of the reasons for the Court's holding that "a reasonable juror could find that defendants reasonably denied Dr. Ketzner's claim for benefits." (Opinion at 30-31). Plaintiff failed to shoulder the burden, whereas the facts as presented provided that defendants' denial of Dr. Ketzner's disability claim was fairly debatable.

All the outside evidence relied on by Dr. Gallina in his 1999 report was listed and available to plaintiff. Dr. Gallina's own observation of Dr. Ketzner was sufficiently detailed in the report, including the results of the dozen psychiatric examinations that he conducted. It was based on this information that the Court made its decision, and the results of any discovery concerning Dr. Gallina's

subsequent affidavit would not have led the Court to "have concluded that there is a question of fact as to whether or not Dr. Ketzner's claim was fairly debatable." (Plaintiff's Br. at 14).

CONCLUSION

For the foregoing reasons, plaintiff's motion for reconsideration of this Court's Opinion and Order dated March 5, 2003 is hereby denied.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

DATED: November 25, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 11th day of December, 2003,

ORDERED that Defendants' motion for summary judgment on all counts of Plaintiff's Complaint be, and it hereby is, granted; and it is further

ORDERED that Plaintiff's assertion of a post-Complaint bad faith claim be, and it hereby is, denied.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

OPINION

APPEARANCES:

ANDERSON KILL & OLICK
By: Robert F. Pawlowski, Esquire
One Gateway Center, Suite 901
Newark, New Jersey 07102
(Attorneys for Plaintiff)

DEL MAURO, DIGIAIMO & KNEPPER
By: Steven P. Del Mauro, Esquire
North Tower
8 Headquarters Plaza
Morristown, New Jersey 07960
(Attorneys for Defendants)

BISELL, *Chief Judge*

FACTS and PROCEDURAL HISTORY

Many of the facts relevant to this case are set forth in the Court's opinion dated March 5, 2003 ("March 2003 Opinion") that granted defendants John Hancock Mutual Life Insurance Co. ("John Hancock") and Provident Life Insurance Co.'s ("Provident Life") (collectively, "Defendants") summary judgment motion as to plaintiff Helen Ketzner, M.D.'s bad faith claim. The Court made that determination on its interpretation of *Pickett v. Lloyd's*, 131 N.J. 457 (1993), where the New Jersey Supreme Court held that an insured could only bring a bad faith refusal to pay a first-party claim where an insurer lacked a "fairly debatable" justification for denying the claim.[1] Defendants now move for summary judgment as to all the remaining claims in Plaintiff's complaint filed on October 14, 1999 (the "Complaint"). The following facts either supplement or clarify those recited in the March 2003 Opinion.

On or about January 12, 1998, Dr. Ketzner formally initiated a claim with Defendants concerning what she perceived as her psychiatric disability. She claimed "total disability" beginning on November 14, 1997. Her claim based on purported psychiatric conditions was denied, and this action focuses upon that issue.

However, on or about January 13, 2002, during the course of this litigation, Dr. Ketzner filed another claim for disability benefits under the same policy based on "various orthopedic and neurological afflictions concerning her right hand." Defs.' Br. in Supp. at 2. Her

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[1] Plaintiff's motion for reconsideration of that decision has been denied in a separate Opinion.

established date of disability was also November 14, 1997—the same date of onset of "total disability" due to her purported psychiatric conditions. *See id.* According to Defendants, "[d]espite the late notice of this claim, Provident Life ultimately determined that Dr. Ketzner did satisfy the definition of 'total disability' contained in her policy, and paid retroactive benefits back to Dr. Ketzner's claimed date of disability, November 14, 1997.[2] *Id.* at 2-3. Provident Life also paid "interest on the retroactive benefits up until the date her right hand disability was approved." *Id.* at 3. Plaintiff disputes this point, but the record reveals that Defendants are correct, despite a misstatement in their moving papers.

In making the retroactive payments, Defendants included in their calculation that "$41,250.00 had been paid in connection with her prior disability claim based upon an alleged psychiatric disability, which payments covered the period from February 28, 1999, through July 28, 1999." *Id.* at 15. That is incorrect. In a letter to Dr. Ketzner dated November 8, 2002, Defendants properly explained that that amount—divided by the "monthly benefit of $5,500.00"—calculates to seven and one half months of benefits; therefore, the actual period covered by that payment exceeded the five-month period between February 28 and July 28, 1999 by two and a half months. *See id.* at 9; Pawlowski Aff., Ex. T at 2.

For the hand injury claim, Defendants used January 13, 1998 as the "begin date of [Dr. Ketzner's] claim", which Dr. Ketzner has not disputed. Defs.' Br. in Supp. at 16. Thus her hand injury claim's effective date was two months after her claimed date of total disability due

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[2] Defendants provide a summary of Dr. Ketzner's claim process for her right hand injury in their brief in support of summary judgment. *See* Defs.' Br. in Opp. at 8-21.

to her alleged psychiatric condition.[3] For her claim stemming from the hand injury, "Provident Life initially paid Dr. Ketzner monthly benefits for the one (1) year period between February 12, 1998, and February 28, 1999, and for the period from January 1, 2002, to present." *Id.* at 17. Therefore, the only remaining period not paid concerning her hand injury claim was for the period between July 29, 1999 and December 31, 2001. After further documentation was received, however, Defendants went forward and paid Dr. Ketzner the amount due for that period. *See id.* at 20. Though, for this time period, Defendants deducted payments for five overlapping months already paid to Dr. Ketzner concerning her alleged psychiatric disability. *See id.* The remaining amount from the prepayment for Dr. Ketzner's alleged psychiatric disability, covering two and a half months, accounts for the difference in acknowledged onset dates for the two stated reasons for disability. Therefore, Dr. Ketzner has been paid, in total, for her alleged psychiatric disability by way of (1) a preliminary, conditional payment made by Defendants concerning that claim and (2) accepted payments for her hand injury disability which ran nearly concurrent with her alleged psychiatric disability.

DISCUSSION

Summary Judgment Standard

Federal Rule of Civil Procedure 56(c) provides that summary judgment should be granted "if the pleadings, depositions, answers to interrogatories, and admissions

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[3] For both claims, a "30-day non-payable elimination period" pursuant to the policy applies. *See* Defs.' Br. in Opp. at 19 & 20.

on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3d Cir.) (en bane), *cert. dismissed*, 483 U.S. 1052 (1987). In deciding a motion for summary judgment, a court must view the facts in the light most favorable to the nonmoving party and must resolve any reasonable doubt as to the existence of a genuine issue of fact against the moving party. *See Continental Ins. Co. v. Bodie*, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of establishing that there are no genuine issues of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24 (1986).

The Supreme Court has stated that, in applying the criteria for granting summary judgment:

> the judge must ask . . . not whether . . . the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the [nonmoving party] on the evidence presented. The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [nonmoving party]. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986). A fact is "material" only if it will affect the outcome of a lawsuit under the applicable law, and a dispute over a material fact is "genuine" if the evidence is such that a reasonable factfinder could return a verdict for the nonmoving party. *See id.* Stated differently, once the

moving party has carried its burden establishing that no genuine issues of material fact exist, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts in question." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

Declaratory Relief and Breach of Contract

Defendants argue that Dr. Ketzner's claim for declaratory relief and her claim for breach of contract are moot because Defendants have paid and continue to pay her disability benefits. The Court agrees. Dr. Ketzner filed this action, in part, claiming that Defendants breached their contractual obligations by failing to provide disability coverage concerning Dr. Ketzner's alleged psychiatric disabilities. However, as detailed above, Dr. Ketzner filed another claim of total disability concerning her orthopedic condition during the course of this litigation. Upon the subsequent claim, Defendants paid Dr. Ketzner money owed under the disability insurance policy for the same period that she alleged that she was totally disabled due to psychiatric disabilities. Therefore, Plaintiff's 1999 request for declaratory judgment is moot as she is in "receipt of disability payment under the [i]nsurance [p]olicy." *See* Compl. ¶¶ 35-40.

Defendants further state, and Plaintiff does not dispute, that under the disability insurance policy, the insured can only recover once, regardless of whether multiple disabilities lead to the finding of "total disability." Presently, Dr. Ketzner is being paid the benefits monthly. Defs.' Br. in Supp. at 21. Now, Plaintiff disputes, however, that she "has not been paid disability insurance benefits from November 14, 1997 through January 13, 1998—the date of the onset of her orthopedic [right hand] total disability." Pl.'s Br. in Opp. at 11. That

assertion is incorrect as a letter to Dr. Ketzner from Defendants delineated that the payments incorporated the period between November 14, 1997 and January 13, 1998. The Court addressed those calculations above, and agrees with Defendants' representations.

The other reasons offered by Plaintiff to support her position that the breach of contract claim is not mooted are that "Dr. Ketzner's Complaint demands compensatory and consequential damages." *Id.* at 12. First, "[c]ompensatory damages are designed 'to put the injured party in as good a position as he would have had if performance had been rendered as promised.' " *Donovan v. Bachstadt*, 91 N.J. 434, 444 (1982) (quoting 5 Corbin, Contracts § 992 at 5 (1951)). Here, it is clear that Plaintiff has been properly compensated; retroactive disability payments (with interest payments totaling $22,113.97) were made covering a disability period beginning November 14, 1997. In addition, Plaintiff continues to receive monthly payments. Therefore, Dr. Ketzner is "in as good a position as [she] would have had if" Defendants had approved her disability claim for her purported psychiatric illnesses *ab initio*.

Second, as to consequential damages, "[u]nder a contract theory the insured is generally denied consequential damages for failure to pay the loss, because in a suit for money due under a contract, recovery is limited to the debt plus interest." *Polito v. Continental Cas. Co.*, 689 F.2d 457, 461 (3d Cir. 1982); (interpreting New Jersey law where an insured claimed consequential damages because its insurer failed to promptly provide financial coverage); *see also Donovan*, 91 N.J. at 443-44 ("Judicial remedies upon breach of contract fall into three general categories: restitution, compensatory damages and performance."). The New Jersey Supreme Court's subsequent holding in *Pickett* alters *Polito*'s holding only

insofar as punitive damages are now available when an insurer lacks a fairly debatable justification for denying an insured's claim. But, as this Court decided earlier, Defendants did not act in bad faith and punitive damages are therefore not available. Here, Plaintiff has and is receiving essentially a disability insurance version of "debt plus interest." As such, Plaintiff's breach of contract claim fails and Defendants' motion for summary judgment as to this claim is GRANTED.

Breach of Fiduciary Duty

Plaintiff alleges a cause of action for breach of fiduciary duty. According to Plaintiff, *Pickett* held that "[a]n insurance company owes its policyholder a fiduciary duty not only in settling underlying claims, but also in the 'ordinary contractual' duties of claim payment." Pl.'s Br. in Opp. at 13. *Pickett,* however, did not find such a relationship for "ordinary contractual" duties as Plaintiff contends. Instead, *Pickett* reiterated a Third Circuit holding interpreting New Jersey law recognizing "that casualty insurers undertake an implied contractual duty, as fiduciaries to parties with whom they have a contractual relationship, to act in good faith and to deal fairly *in the settlement of claims* . . . ." *Pickett,* 131 N.J. at 472 (emphasis added) (quoting *Polito,* 689 F.2d at 463). In *Pickett,* the New Jersey Supreme Court also stated that "[a]n insurance company's breach of the fiduciary obligation imposed by virtue of its policy, by its wrongful *failure to settle,* 'sounds in both tort and contract.' " *Pickett,* 131 N.J. at 470 (emphasis added) (quoting *Rova Farms Resort, Inc. v. Investors Ins. Co.,* 65 N.J. 474, 504 (1974)).

Thus in each instance, where the *Pickett* court mentioned a fiduciary duty, the court limited it to the settlement context—where an insurer refuses to settle a

third-party claim against its insured within the coverage limit, as was the case in *Rova Farms*. Here, we are not faced with that situation. Instead, a line of New Jersey state decisions have held that "a fiduciary duty may rise between an insurer and its insured in special circumstances." *Ellmex Constr. Co. v. Republic Ins. Co.*, 202 N.J. Super. 195, 206 (App. Div. 1985) (citing *Rova Farms*, 65 N.J. at 492). And that "[t]he mere presence of a fiduciary duty regarding one aspect of the insurance contract does not necessarily require that such a duty govern all aspects of the agreement." *Id.* at 378 (citation omitted).

Presently, the central issue is whether Defendants improperly denied Dr. Ketzner coverage. A similar situation was described by the state court in *Kosce v. Liberty Mutual Insurance Co.*, 152 N.J. Super. 371 (Law Div. 1977), where it held:

> Certainly, an insurer's task of determining whether the insurance policy provided coverage . . . cannot be deemed to give rise to such a [fiduciary] duty on the part of the insurer. The parties, in this respect, are merely dealing with one another as they would in a normal contractual setting.

Kosce, 152 N.J. Super. at 379. Therefore, under New Jersey law, no fiduciary duty exists for what Plaintiff deems "ordinary contractual" duties. Instead, what exists, in terms of the duty of the insurer, is "that an insurance company owes a duty of good faith to its insured in processing a first-party claim." *Pickett*, 131 N.J. at 467.

Because under New Jersey law there does not exist a fiduciary relationship between an insurer and insured concerning the provision of coverage pursuant to the terms of an insurance policy, Plaintiff's claim for breach

of fiduciary duty fails and Defendants' motion for summary judgment as to this count is GRANTED.

Conversion

The tort of conversion is defined as "an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of an owner's rights." *McGlynn v. Schultz*, 90 N.J. Super 505, 526 (Ch. Div. 1966) (citations omitted), *aff'd*, 95 N.J. Super. 412 (App. Div.), *cert. denied*, 50 N.J. 409 (1967); *see also McAdam v. Dean Witter Reynolds, Inc.*, 896 F.2d 750, 771 (3d Cir. 1990) (citing *McGlynn* and defining conversion as "essentially the wrongful exercise of dominion and control over the property of another in a manner inconsistent with the other person's rights in that property"). Money can be the subject of conversion.

Plaintiff alleges that the disability insurance benefits to which she claims she was "absolutely entitled" "were at all times her property over which Provident [Life] wrongfully exercised dominion and control in a manner inconsistent with Dr. Ketzner's rights." Pl.'s Br. in Opp. at 14. She claims that her "right to payment" was "absolute" because she met the conditions required under the disability insurance policy. *See id.* However, she ignores that Defendants did not reach that conclusion after receiving a report by Dr. Gallina in mid-March 1999. Further, this Court held previously that there exists genuine issues of material facts as to Dr. Ketzner's medical condition, such that Dr. Ketzner's opinion that coverage was "absolute" is relative and unsubstantiated.

On Defendants' motion for summary judgment, however, it is the defendants' burden to establish that there are no genuine issues of material fact. Defendants assert that Dr. Ketzner has no cognizable claim for conversion.

To support their argument, they cite *Montgomery v. Federal Insurance Co.*, 836 F. Supp. 292 (E.D. Pa. 1993). That court faced the same claim presented by Plaintiff—that "by refusing to pay the plaintiff the proceeds of [an insurance policy covering a collection of memorabilia], [the insurer] has retained for itself funds belonging to the plaintiff." *Montgomery*, 836 F. Supp. at 300. The *Montgomery* court held that the plaintiff's claim could not be a subject of conversion, and instead characterized the failure to pay out the insurance claim as simply a failure "to satisfy its contractual obligation.[4] *Id.* at 301. That holding falls in line with "other courts [that] have firmly accepted the doctrine that an action for conversion will not lie where damages asserted are essentially damages for breach of contract." *Id.* at 301-02 (citations omitted).

Montgomery tackled what it deemed a "novel issue in Pennsylvania law." *Id.* at 300. Pennsylvania law finds conversion "when a party deprives the owner from his right or use of or possession of a chattel, without the owner's consent and without lawful justification." That is substantively identical to *McGlynn*'s definition of conversion. Thus *Montgomery*'s application of the same law with similar facts—an insurer denying coverage on an insurance policy—is instructive and persuasive. As such, this Court holds that Plaintiff's claim for conversion is

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[4] Plaintiff argues that the *Montgomery* court "reasoned that had the plaintiff's right to payment been 'absolute,' the conversion cause of action would be viable." Pl.'s Br. in Opp. at 14. That is inaccurate. *Montgomery* held that only "if a plaintiff entrusts money or goods with the defendant, with the intent that the defendant transfer the goods and give the proceeds to the plaintiff, and defendant keeps the proceeds or applies it to his own use, [is there] conversion." *Montgomery*, 836 F. Supp. at 300. The facts here are not similar to that situation, even had Dr. Ketzner's "right to payment been 'absolute.' "

not cognizable under the facts of this case and Defendants' motion for summary judgment as to this count is GRANTED.

Negligent and/or intentional Misrepresentation

Dr. Ketzner claims that she has a cognizable claim for negligent and/or intentional misrepresentation. She claims that Defendants twice made misrepresentations. The first alleged misrepresentation occurred when Provident Life "told Dr. Ketzner that it 'agreed to provide benefits as stated in [the disability insurance] policy' as long as she kept her policy in force." Pl.' Br. in Opp. at 15. The second alleged misrepresentation stems from Provident Life's purchase of Hancock's disability insurance business. Dr. Ketzner claims that "[b]y collecting premiums from Dr. Ketzner under the guise of [John] Hancock, Provident [Life] knowingly misrepresented the material fact of their identity with the intent to deceive Dr. Ketzner." *Id.* at 15-16.

The tort of fraudulent misrepresentation, what Plaintiff terms intentional misrepresentation, under New Jersey law, "consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely thereon, resulting in reliance by that party to his detriment." *Jewish Ctr. of Sussex County v. Whale*, 86. N.J. 619, 624 (1981) (citing *Foont-Freedenfeld v. Electro-Protective*, 126 N.J. Super. 254, 257 (App. Div. 1973)). Here, neither of Defendants' alleged representations amounts to "fraudulent misrepresentation."

First, because Dr. Ketzner simply paid her premiums in a timely manner did not guarantee, as she suggests, that she would receive disability coverage by the mere act of filing a claim. A finding by Defendants of "total disability" was required under the insurance policy; a

finding that was not reached for Dr. Ketzner's purported psychiatric disorders, and a determination which this Court previously ruled was not made in bad faith.

Second, regarding the identity of the insurance provider, Defendants adequately show that no material misrepresentations were made with knowledge of its falsity. "Pursuant to an acquisition agreement entered between Provident Life and John Hancock on July 30, 1992, Provident Life acquired the entire block of individual non-cancellable disability income business . . . from John Hancock", including Dr. Ketzner's disability insurance policy. Pawlowski Aff., Ex. I, ¶2 (Henry T. Hardin, III Aff.).[5] As such, Provident Life agreed to assume all obligations "concerning the administration and adjudication of claims" while agreeing "to utilize John Hancock's name on all correspondence, claim forms and checks/drafts transmitted in connection with claims made under policies subject to the acquisition." *Id.*, Ex. I, ¶4. Due to this agreement there is no evidence of false knowledge on display when all forms continued to bear John Hancock's name; therefore, Dr. Ketzner's claim of intentional misrepresentation fails as a matter of law.

A claim for negligent misrepresentation (or equitable fraud) requires the same proof elements as those for intentional misrepresentation minus the scienter element

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[5] Previously, Defendants disclosed that "[p]ursuant to an agreement entered on July 30, 1992, [Provident Life] assumed responsibility for adjudicating claims under certain policies previously issued by John Hancock, including the policy issued to Dr. Ketzner. Under this agreement, [Provident Life] was solely responsible for performing all claim administration, as well as funding the payment of benefits, and John Hancock did not participate in the adjudication or payment of benefits under the policy of disability income insurance." Defs.' Br. in Opp. to Pl.'s Notice of Appeal at 1.

and the intention that the other party rely. Thus, only material misrepresentation and detrimental reliance are the elements of negligent misrepresentation. *See Jewish Ctr.*, 86 N.J. at 625 (citing *Foont-Freedenfeld*, 126 N.J. Super. at 257). Again, here, neither of Defendants' representations amounts to "negligent misrepresentation" because no material misrepresentations were made as to either of Dr. Ketzner's allegations. Therefore, Defendants' motion for summary judgment as to this count is GRANTED.

Unjust Enrichment

Dr. Ketzner cites *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539 (1994), for her contention that "Provident has been unjustly enriched by wrongfully earning interest on all money due and owing Dr. Ketzner." *See* Pl.'s Br. in Opp. at 16. As explained above, however, all monies owed and paid to Dr. Ketzner pursuant to her accepted hand disability claim run concurrent to her alleged psychiatric disability, with the exception of an additional two and a half months. However, payment for that time was previously made by Defendants. Therefore Defendants have made all necessary payments to Dr. Ketzner regardless of whether her psychiatric disability claim is substantiated.

"The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant *and* that the failure of remuneration enriched defendant beyond its contractual rights." *VRG Corp.*, 135 N.J. at 554 (emphasis added); *see also Callano v. Oakwood Park Homes Corp.*, 91 N.J. Super. 105, 109 (App. Div. 1966) ("To recover on the theory of *quasi*-contract", "[t]he key words are *enrich* and *unjustly*."). Regardless of whether Plaintiff rightfully expected "remuneration"

from Defendants shortly after she filed her alleged psychiatric disability claim, Defendants shouldered their burden of providing that there are no genuine issues of material fact. All money owed was paid, with interest; therefore, no defendant was "enriched . . . beyond its contractual rights."

Plaintiff tries to assert that Defendants have also been unjustly enriched "by wrongfully earning interest and other profits on all money due to thousands of Provident [Life]'s New Jersey policyholders." Pl.'s Br. in Opp. at 16. However, this allegation is not the subject of the present litigation which, of course, is not a class action. Any other potential plaintiffs have their own remedies available to them. Here, even under this quasi-contract obligation, Dr. Ketzner is not entitled to recovery because Defendants have not been unjustly enriched. Therefore, Defendants' motion for summary judgment as to this count is GRANTED.

New Jersey Consumer Fraud Act

Defendants present accurately that the New Jersey Consumer Fraud Act (the "NJCFA") does not apply to Dr. Ketzner's claims. *See* Defs.' Br. in Supp. at 34. Dr. Ketzner's allegation mirrors the language of the NJCFA,[6] and states that "[John] Hancock acted, used, or employed unconscionable commercial practices, decep-

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[6] N.J.S.A. 56:8-2 ("Fraud, etc., in connection with sale or advertisement of merchandise or real estate as unlawful practice") provides in part, that "[t]he act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . is declared to be an unlawful practice." N.J.S.A. 56:8-2.

tions, frauds, misrepresentations, and false pretenses and promises in its dealings. with Dr. Ketzner, including sale of the Insurance Policy." Pl.'s Br. in Opp. at 17. She repeats the same allegations concerning representations made by Defendants as were provided in her claim alleging intentional and negligent misrepresentation. These alleged misrepresentations were discussed above, and the Court determined that both torts of intentional and negligent misrepresentation do not apply. Therefore, the Court finds no support for her claim under the NJCFA.

Further, *Pierzga v. Ohio Casualty Group*, 208 N.J. Super. 40 (App. Div. 1986), is instructive. That court noted that an "anomalous" situation would arise if treble (and therefore punitive) damages pursuant to the NJCFA were awarded, when another state court ruled previously that there was no right of recovery of punitive damages against an insurance carrier which wrongfully withholds [personal injury protection] benefits." *Pierzga*, 208 N.J. Super. at 44 (reciting the holding of *Milcarek v. Nationwide Ins. Co.*, 190 N.J. Super. 358 (App. Div. 1982)). A similar anomalous situation would occur here if punitive damages pursuant to the NJCFA were awarded, because it would, as Defendants put it, "emasculate" the New Jersey Supreme Court's holding in *Pickett* as well as this Court's previous application of *Pickett* and its determination that Defendants did not act in bad faith in denying Dr. Ketzner's alleged psychiatric disability claim.

False Statements Regarding Coverage

Dr. Ketzner's claim of "false statements regarding coverage" fails as a matter of law as there exists no such cause of action. Plaintiff alleges that "[b]y telling Dr. Ketzner that she was not entitled to disability insurance benefits for her [alleged] total mental disability, Provident [Life] made a false statement regarding coverage."

Pl.'s Br. in Opp. at 18. Without providing a legal basis for this claim, Plaintiff simply provides that such statements "are intolerable and actionable." *Id.* This Court finds, however, that no such cause of action exists. Furthermore, this Court determined in it March 2003 Opinion that Defendants' denial of her purported psychiatric disability claim was fairly debatable, and necessarily not a false statement as alleged. As such, Defendants' motion for summary judgment as to this Count is GRANTED.

Subsequent Bad Faith Claim

In opposing Defendants' motion for summary judgment, Dr. Ketzner presents to the Court an argument, in part, that Provident Life's "solicitation and acquisition of the aforementioned irrelevant and intrusive discovery . . . constitutes claims harassment and is a breach of Provident [Life]'s duty of good faith and fair dealing towards Dr. Ketzner." Pl.'s Brf. in Opp. at 19. Obviously, this is not a claim in Plaintiff's complaint. Nevertheless, the Court will address this issue as a decision here may effectively conclude the litigation in this forum.

This Court's previous opinion concerning Dr. Ketzner's motion to amend her complaint effectively resolves this renewed effort at asserting a post-complaint bad faith claim. On March 5, 2003, this Court wrote that "Dr. Ketzner complains primarily of defendants' discovery pursuits which requested what she considers irrelevant information regarding physical ailments that are not related to the psychiatric disabilities that she originally claimed." The Court continued that "these discovery requests [were approved by] Judge Haneke . . . and Dr. Ketzner decided not to appeal." And, the Court stated that "[l]ike the previous claims . . . this count has effectively been rejected by Magistrate Judge Haneke without

a timely appeal." This Court upheld the Magistrate's ruling.

Now, the same issue is presented by Dr. Ketzner in opposition to Defendants' summary judgment motion. For the reasons previously expounded by this Court, this recent attempt at asserting a post-complaint bad faith claim fails.

CONCLUSION

For the foregoing reasons Defendants' motion for summary judgment on all counts is GRANTED and Plaintiff's assertion of a post-complaint bad faith claim is DENIED.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

DATED: December 11, 2003

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWB)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

ORDER

For the reasons set forth in the Court's Opinion filed herewith,

It is on this 11th day of December, 2003,

ORDERED that Defendants' motion for summary judgment on all counts of Plaintiff's Complaint be, and it hereby is, granted; and it is further

ORDERED that Plaintiff's assertion of a post-Complaint bad faith claim be, and it hereby is, denied.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil Action No. 99-4852 (JWE)

HELEN KETZNER, M.D.,

Plaintiff,

—v.—

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE INSURANCE COMPANY,

Defendants.

ORDER

It is on this 15th day of December, 2003.

ORDERED that Plaintiff's appeal of the April 22, 2003 Magistrate's decision denying Plaintiff's motion for leave to amend the complaint be, and it hereby is, denied.

JOHN W. BISSELL

JOHN W. BISSELL
Chief Judge
United States District Court

November 14, 2001

LETTER OPINION
ORIGINAL TO CLERK OF THE COURT

Robert F. Pawlowski, Esq.
Anderson, Kill & Olick
One Gateway Center
Suite 901
Newark, N.J. 07102

Steven P. Del Mauro, Esq.
Del Mauro, DiGiaimo & Knepper
8 Headquarters Plaza
North Tower
Morristown, N.J. 07960

RE: Ketzner v. John Hancock, et al
Civil Action No. 99-4852 (JWB)

Dear Counsel:

I have reviewed all of the correspondence which you sent to me regarding the documents produced by Doctors David and Nancy Gallina.

I have also considered the documents themselves, which were forwarded to me for *in camera* review pursuant to my order of November 9, 2001.

Two things are entirely clear. First, the disclosure was inadvertent. The doctors are defense experts. If they are to testify as defense experts in the event of any trial of this matter, they will be obligated to produce an appropriate expert report pursuant to Federal Rule of Civil Procedure 26. Until such time as that becomes necessary, the materials produced remain confidential.

Secondly, it appears that discovery requests and deposition notices are continuing to be served in this action. I remind all parties that this matter is now, at your joint request, in mediation and that the Court entered a stay. A stay means just what it says. No further discovery or requests for discovery until the conclusion of the mediation.

Thank you for your cooperation.

Very truly yours,

G. DONALD HANEKE

G. Donald Haneke
United States Magistrate Judge

GDH:rl
cc: Hon. John W. Bissell
United States District Judge

No. 05-372

In The
Supreme Court of the United States

HELEN KETZNER,

Petitioner,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY and PROVIDENT LIFE AND ACCIDENT INSURANCE COMPANY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

THOMAS P. SCRIVO
MCELROY, DEUTSCH, MULVANEY & CARPENTER, LLP
1300 Mount Kemble Avenue
P.O. Box 2075
Morristown, NJ 07962-2075
(973) 993-8100

Attorneys for Respondents, John Hancock Mutual Life Insurance Company and Provident Life and Accident Insurance Company

CORPORATE DISCLOSURE STATEMENT

Provident Life and Accident Insurance Company is a wholly owned subsidiary of UnumProvident Corporation, a publicly traded company. John Hancock Mutual Life Insurance Company was renamed to "John Hancock Life Insurance Company." John Hancock Life Insurance Company is a subsidiary of John Hancock Financial Services, Inc., a publicly traded company that owns more than ten percent of John Hancock Life Insurance Company's stock.

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INTRODUCTION

The Petitioner frames the issue in this case as whether a party has the right to a jury trial to decide issues of fact under the Seventh Amendment. The question presented by the Petitioner is baffling however, because there is no dispute that the Seventh Amendment provides the right to a jury in legal actions. See Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41 (1989). It is only from a review of the Petition that the true question presented appears, namely, whether summary judgment violates the Seventh Amendment. On this point Supreme Court case law is well settled; summary judgment does not violate the Seventh Amendment. Fidelity & Deposit Co. of Maryland v. United States, 187 U.S. 315, 319-20 (1902). Indeed, this Court has provided extensive guidance on the proper use of summary judgment, and there is no circuit split on this issue. See Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). Therefore, as the Petition does not present any novel issues of constitutional magnitude, but instead represents a continued waste of judicial resources that has become the hallmark of this case, it should be denied.

STATEMENT OF THE CASE[1]

On July 22, 1991, John Hancock Life Insurance Company ("John Hancock") issued a policy of disability income insurance to Petitioner, Helen Ketzner M.D., bearing policy no. H009 757 339. The policy provides a monthly disability benefit of $5,500 provided the claimant is able to

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[1] The Respondents disagree entirely with Petitioner's list of factual errors. (Pet'r Br. at 3-5.) A review of the record shows that each of these alleged errors were addressed and properly resolved by the courts below.

show that she suffers from a disability preventing her from performing the material duties of her regular occupation. Once the payment of benefits begins, they are payable to the claimant for the remainder of her disability or until age sixty-five, whichever comes first.

On January 12, 1998, Provident Life Insurance Company ("Provident Life")[2] received a handwritten note from Dr. Ketzner advising that since November 13, 1997, she had been unable to work due to disability. Provident Life sent disability claim forms to Dr. Ketzner the same day, and the completed forms alleged that Dr. Ketzner suffered from dysthymic depression. After receiving the claim forms Provident Life began its investigation of Dr. Ketzner's alleged depression. Ultimately, Provident Life denied her claim because it did not receive sufficient evidence that Dr. Ketzner was disabled as defined in the policy. The Respondents adopt the facts set forth in the Honorable John W. Bissell's opinion dated March 5, 2003, concerning Dr. Ketzner's claim for depression. (Pet'r Supp. App. at 14a-29a.)

On October 14, 1999, Dr. Ketzner filed a nine-count complaint against Respondents seeking disability benefits. The complaint included causes of action for breach of contract, breach of the duty of good faith and fair dealing, breach of fiduciary duty, conversion, negligent and intentional misrepresentation, unjust enrichment, violation of the New Jersey Consumer Fraud Act, false statements regarding coverage, and a demand for a declaratory judgment. (Resp't App. at 1Ra-23Ra.)

On March 3, 2000, Dr. Ketzner moved to amend her complaint to include causes of action for wrongful defense, and for a declaration that the insurance policies at issue were

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[2] Pursuant to a contract executed on July 30, 1992, Provident Life assumed responsibility for adjudicating claims under certain policies issued by John Hancock, including the policy issued to Dr. Ketzner.

"products." (Id. at 24Ra-27Ra.) The Honorable G. Donald Haneke, U.S.M.J., denied this motion on April 24, 2000, and Dr. Ketzner did not appeal the denial. (Pet'r Supp. App. at 1a.) On March 11, 2002, Dr. Ketzner moved a second time to amend her complaint seeking to assert additional causes of action for post-complaint bad faith, claims harassment, post-loss underwriting, repudiation of the insurance policy, disgorgement of profits, invasion of privacy, malicious abuse of process, and opportunistic breach of contract. (Resp't App. at 28Ra.) Judge Haneke denied Dr. Ketzner's motion, and his order was affirmed by Judge Bissell on appeal. (Pet'r Supp. App. at 3a-10a.) Finally, on April 21, 2003, and after four years of litigation, Judge Haneke denied a third motion to amend the complaint. (Id. at 39a.) In this third motion Dr. Ketzner moved to assert a cause of action under the RICO statute. Judge Bissel affirmed Judge Haneke's order on appeal. (Id. at 85a.)

On January 22, 2002, during the course of the litigation, Dr. Ketzner filed a second claim for disability benefits with Provident Life for "orthopedic and neurological afflictions to her right hand." (Id. at 67a.) Dr. Ketzner alleged that this latter disability began within weeks of her psychiatric disability claim. (Id. at 68a.) Hence, the latter claim overlapped with Dr. Ketzner's original disability allegations. Notwithstanding the late notice, Respondents approved Dr. Ketzner's orthopedic disability claim in full and paid retroactive benefits with an additional $22,113.97 in interest. Dr. Ketzner continues to receive disability benefits at present. It should be noted that once Dr. Ketzner's latter claim for benefits was approved, she had received the maximum amount of benefits she was entitled to under the policy. Therefore, Dr. Ketzner's continued pursuit of damages under a breach of contract cause of action illustrates the merciless litigation tactics the respondents and the district court were forced to endure.

On March 5, 2003, Judge Bissell granted Respondents' partial motion for summary judgment

dismissing Dr. Ketzner's bad faith claim. (Id. at 11a.) On December 11, 2003, Judge Bissell granted Respondents' motion for summary judgment dismissing all remaining causes of action. (Id. at 65a.) Dr. Ketzner appealed and the United States Court of Appeals for the Third Circuit affirmed the district court's rulings. (Id. at 15a.) On May 11, 2005, nearly six years after the filing of the complaint, the Third Circuit denied Dr. Ketzner's petition for rehearing and her petition for rehearing en banc. (Id. at 16a.)

REASONS FOR DENYING THE WRIT

I. Summary Judgment Does Not Violate the Seventh Amendment

Dr. Ketzner's petition contends that the grant of summary judgment in this matter violated her Seventh Amendment right to a Jury Trial. This argument is without merit, however, as it is well-settled that summary judgment does not violate the Seventh Amendment. See Fidelity & Deposit Co. of Maryland, 187 U.S. at 319-20. Indeed, "many procedural devices developed since 1791 that have diminished the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment." Parklane Hosiery Co. Inc., v. Shore, 439 U.S. 322, 336 (1979) (holding that a court's determination of issues in an equitable action could collaterally estop relitigation of the same issues in a subsequent legal action without violating a litigant's right to a jury trial); See also Weisgram v. Marley Co., 528 U.S. 440, 448 (2000) (allowing Fed. R. Civ. P. 50 judgment as a matter of law "when the facts are sufficiently clear that the law requires a particular result."); and Dimick v. Schiedt, 293 U.S. 474, 486 (1935) (allowing a court to remit an excessive jury award). The Seventh Amendment certainly does not guarantee the automatic denial of summary judgment as the Dr. Ketzner's petition implicitly suggests. See e.g., Celotex Corp., 477 U.S. at 322-24.

A review of the district court's decision shows that summary judgment was appropriate. This case was litigated for more than four years in the district court, and during this time extensive discovery was exchanged, depositions were conducted, and several motions were filed and resolved. The United States Court of Appeals for the Third Circuit noted the extensive history of the litigation below and the amount of work performed by the District Court. (Pet. Appx. at 8a.) Ultimately, all of these efforts were in vain as Dr. Ketzner's orthopedic disability clam provided her with all of the benefits under the policy that she could possibly have received. Nevertheless, Dr. Ketzner continued to press her claim and, after a thorough review of New Jersey law, the district court determined that summary judgment was appropriate.

II. There is No Circuit Split on the Question Presented

The notion that there is a split between the Second and Third Circuits concerning the right to a jury trial is simply false. Dr. Ketzner's petition attempts to create the impression of a circuit split by comparing this case to a Second Circuit decision analyzing whether causes of action for breach of fiduciary duty under Delaware common law and violation of Del. Gen. Corp. L. § 160[3] involved equitable rights or legal rights. See Pereira v. Farace, 413 F.3d 330, 336 (2d Cir. 2005). The decision in Pereira rested on settled Supreme Court precedent. See id. at 337 (citing Granfinanciera, S.A., 492 U.S. at 41). The Third Circuit applies the same precedent to cases before it under similar circumstances. Compare id. at 337, with Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242, 1245 (3d Cir. 1994), and Beard v. Braunsten, 914 F.2d 434, 437-40 (3d Cir.

[3] Prohibiting the payment of dividends while a corporation is insolvent, or which will render it insolvent.

1990) (also following the test prescribed in Granfinanciera, S.A.). The district court did not deny Dr. Ketzner a jury trial, instead it found that pursuant to Fed. R. Civ. P. 56 Respondents were entitled to judgment as a matter of law. (See Pet. Supp. Appx. 69a-71a.) In making this determination the district court followed Supreme Court precedent concerning the proper use of summary judgment. (Pet. Supp. Appx. 70a-71a (citing Celotex Corp., 477 U.S. at, 322-24; Anderson, 477 U.S. at 252; Matsushita Elec. Indus. Co., 475 U.S. at 586)).

Moreover, the decision below cannot create a "circuit split" because it is not precedential. Decisions that are not precedential are not authoritative in the Third Circuit. See Dibella v. Borough of Beachwood, 407 F.3d 599, 603 (3d Cir. 2005) (citing Third Circuit Internal Operating Procedure 5.7 (July 2002)). Thus, it is clear that there is no split between the Second and Third Circuits concerning the Seventh Amendment.

III. There is No Split Within the Third Circuit

Dr. Ketzner asserts that her petition should be granted because there is a split within the Third Circuit. The Petitioner points to a Third Circuit decision in the case of Weiss v. First Unum Life Ins. Co., No. 04-2021 (3d Cir. filed June 9, 2005), as conflicting with the decision below in this matter. However, this argument also fails because neither of these cases are precedential, and for the reasons cited above, they are not binding on any Third Circuit Court.

The case in Weiss is also distinguishable for several reasons. First, Weiss concerned an ERISA plan participant's claim for benefits. The application of ERISA is not an issue in this case. Second, the decision in Weiss was a remand order that did not rule on the merits of that case. (See Pet. Supp. Appx. 20a). As such, it should not be compared to the Third Circuit's unpublished opinion in Ketzner v. John Hancock Mutual Life Insurane Co., No. 03-4870 (3d Cir.

filed Dec. 17, 2004), where the merits of the case were thoroughly addressed before affirming summary judgment. Finally, the Third Circuit panel in Weiss was aware of the prior unpublished opinion in Ketzner as it was part of the record provided by the appellees. Hence, it is clear that the Third Circuit determined there was no conflict between the two holdings.

Even assuming that these two cases were precedential and presented conflicting holdings, "[u]nder Third Circuit Internal Operating Procedure 9.1, when two decisions of [the Third Circuit] conflict, [the court] is bound by the earlier decision." Ryan v. Johnson, 115 F.3d 193, 198 (3d Cir. 1997). The Third Circuit can only overrule its own decisions en banc. See Rubin v. Buckman, 727 F.2d 71, 73-73 (3d Cir. 1984) (Garth, concurring). Here, the decision below was decided December 17, 2004, seven months earlier than the Third Circuit decision in Weiss. Therefore, assuming both of these cases were precedential, the Third Circuit decision with respect to Dr. Ketzner would control. Consequently, the argument that there is a split within the Third Circuit is unsustainable and must fail.

IV. The Study Upon Which Petitioner Relies Provides Numerous Reasons for the Decline in the Number of Trials

The empirical study upon which Dr. Ketzner relies to support her petition is flawed and inapplicable to the facts of this case. There are several reasons for the decline in the number of trials, and such an inquiry only acts to obfuscate the true issue before the Court: whether the district court's grant of summary judgment violated the Petitioner's Seventh Amendment right to a jury trial. First, the article Dr. Ketzner cites does not squarely support the proposition she is attempting to assert as the article analyzes all trials, including bench trials. See Marc Galanter, The Vanishing Trial: An Examination of Trials and Related Matters in Federal and